UNIVERSITY OF PENNSYLVANIA

THE CONSTITUTIONAL AND LEGAL BASIS OF EDUCATION IN NEW JERSEY

CARL GRAYDON LEECH

A THESIS
IN EDUCATION
PRESENTED TO THE FACULTY OF THE GRADUATE SCHOOL IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

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PREFACE

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C. G. L.

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KEY TO ABBREVIATIONS AND REFERENCES

A	Atlantic Reporter
Code	School Code (New Jersey School Laws, 1928 Edition)
Com. of Ed.	Commissioner of Education of New Jersey
Const.	Constitution of State of New Jersey
C. S.	Compiled Statutes of New Jersey (1709–1910)
Cum. Sup.	Cumulative Supplement (1911–1924) to Compiled Statutes of New Jersey
Dick. Ch.	Dickinson Chancery Reports (Vols. 46–66, New Jersey Equity Reports)
Dutch.	Dutcher (Vols. 25–29, New Jersey Law Reports)
C. E. Gr.	C. E. Green (Vols. 16–27, New Jersey Equity Reports)
Harr.	Harrison (Vols. 16–19, New Jersey Law Reports)
N. J. Eq.	New Jersey Equity Reports
N. J. L.	New Jersey Law Reports
N. J. L. J.	New Jersey Law Journal
N. J. Misc. Rep.	New Jersey Miscellaneous Reports
P. L.	Public Laws of New Jersey
Rules	Rules and By-Laws of New Jersey State Board of Education, in New Jersey School Laws, 1928 Edition, p. 493–543
S. L. D.	"School Law Decisions of Commissioner of Education and State Board of Education," a printed bulletin prepared by Commissioner of Education, Trenton, 1928
St. Bd.	New Jersey State Board of Education
Stew.	Stewart (Vols. 28–45, New Jersey Equity Reports)
Vr.	Vroom (Vols. 30–85, New Jersey Law Reports)
Zab.	Zabriskie (Vols. 21–24, New Jersey Law Reports)

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CHAPTER I

INTRODUCTION

I. The Purpose of the Study

The purpose of this study is to discover the constitutional and legal provisions upon which education in New Jersey is based, and to discover the legal principles lying at the foundation of these provisions, in so far as these principles are expressed or implied in the constitution and laws of the state, and in the decisions or rulings of the courts or of other established authority.

II. Sources of Material

The material for the study has been obtained in large part from the following sources:

A. The constitution of the United States.
B. Decisions of the federal courts.
C. The constitution of the state of New Jersey, as amended in 1846 and 1875.
D. The New Jersey School Laws, as published in the 1928 edition.
E. The general statutes of New Jersey.
F. The Rules and Regulations, and the By-laws of the State Board of Education, as found in the 1928 edition of the School Law.
G. The decisions of the Supreme Court and of the Court of Errors and Appeals of New Jersey. In some instances the decisions of the district courts in New Jersey have been used. The decisions of the Supreme Court and of the Court of Errors and Appeals are in some cases decisions in law and in other cases decisions in equity.
H. Decisions of the Commissioner of Education and of the State Board of Education.
I. Opinions of the Attorney-General, rendered upon request of the Commissioner of Education or of the State Board of Education.

J. Reports of the Commissioner of Education and of the State Board of Education.

III. LIMITATIONS OF THE STUDY

It should be noted that three limitations have been observed in the development of this study. In the first place, no attempt has been made to bring into the study the whole field of the common law, except as this is expressed or implied in the state laws or in the decisions of the state courts or of the Commissioner of Education or of the State Board of Education. Since this study refers to one state only, it seemed somewhat unwise to include principles of common law not specifically quoted by the New Jersey courts. The second limitation exists in respect to the extent to which consideration is given to the application of the general statutes to educational matters. Reference is made to such statutes, and in most cases sufficient discussion is presented to indicate their bearing upon education. Such laws include those referring to the right of eminent domain and to workmen's compensation, and the special laws chartering institutions of higher education. A third limitation exists in respect to the fact that no attempt has been made to support New Jersey decisions by reference to decisions from courts of other states, except where such are quoted by New Jersey courts. There are many debated points in New Jersey law which have arisen also under the laws of other states and upon which decisions have been rendered in other states, but it was not felt wise to use such decisions in this study since their validity in New Jersey could not be established.

IV. METHOD OF PROCEDURE

In the development of the study, the first step was to analyze the school law and the general statutes to locate the various functions and legal procedures. Next, the various digests of decisions of the federal courts and the New Jersey courts were consulted, and a record was made of all decisions which seemed likely to apply. Following this, the complete decisions in these cases were read in the various reports. Then the decisions of the Commissioner of Education and of the State Board of Education were read and digested. Selected decisions were printed by the Department of Public Instruction in 1928, but the majority are found in the annual reports of the Commissioner of Education from 1912 to 1929 and in certain earlier editions of the school law. The decisions for 1922 and 1923 were not printed in the annual reports of the Commissioner, and exist only in manuscript form except where printed in editions of the school law or in the volume of decisions following those years. Similarly, the decisions of the Commissioner and of the State Board since 1929 are as yet in manuscript. All of these are filed in the office of the Department of Public Instruction at Trenton. Decisions of the Commissioner and of the State Board prior to 1912 were evidently not generally preserved. In a few cases they appear in later editions of the school law or in the printed volume of decisions, and in a very few instances in the printed minutes of the State Board of Education. Members of the staff of the Commissioner of Education made careful search for these earlier decisions, but no trace of them could be found.

In all cases decisions of either the courts or of the school tribunals were checked against later decisions and against later laws to make sure that they are still valid. As was indicated previously, the quotations from the digests of decisions were checked against the decisions themselves, and in all other cases decisions and other material were read a second time to insure correctness.

The opinions of the Attorney-General were found in most cases as published in the "Education Bulletin," the official organ of the Department of Public Instruction. In a few instances they were found in the minutes of the State Board of Education.

The total number of cases heard by the Commissioner of Education and by the State Board of Education, the decisions of which were read, was about 320. The number of court decisions read was almost 450.

V. Historical Sketch of Development of School Laws of New Jersey

The first step toward the development of a state system of public education in New Jersey was taken when the legislature created the State School Fund in 1817. No provision for the distribution of its income was made at that time. Education generally was in the hands of private or church schools, and this meant that the education of children of the poorer classes was left to charity. In 1820 the townships of the state were for the first time authorized to raise money for school purposes, by vote at the town meeting, but only "for the education of such poor children as are paupers." In 1828 a second important step toward the development of local public schools was taken when authority was granted to the townships to raise by vote at the town meeting funds to build and repair school houses.

In 1828 a convention of the friends of education was held at Trenton, of which the purpose was to work for improved educational facilities in the state. This convention appointed a "Central Committee" to collect school statistics from the counties. The information thus gathered disclosed a deplorably high number of children without schooling of any kind. As a result of the feeling aroused by this report, the 1829 legislature set up a plan for public education which represented an important forward step. It provided that the income of the School Fund should be apportioned to the counties in proportion to the state taxes paid, and that the Board of Chosen Freeholders of each county should apportion this money to the townships, if the latter voted an equal amount. To care for these funds and to provide such educational facilities as might be voted by the town meeting, the law provided that the inhabitants of the townships might elect a school committee. In this legislation may be seen the germ of the present scheme of apportionment of school funds in the state. A reactionary movement on the part of the friends of private education, however, brought the repeal of most of these laws in 1830 and 1831, and in the latter year gave a share in the School Fund to private as well as public schools. The sentiment toward public education, however, brought in 1838 the re-enactment of most of the provisions passed in 1829.

It is evident that a state consciousness in educational matters began to develop after 1840. In 1844 a revision of the state constitution included an important provision to prevent the dissipation of the State School Fund. In 1845 the legislature made provision for a Superintendent of Public Instruction, although his authority was limited to Passaic and Essex counties, with the privilege extended to other counties of coming under his jurisdiction if they so desired. In 1846, however, the authority of the State Superintendent was made state-wide, and provision was made for his election by the Trustees of the School Fund. This same year the state system of schools was improved in local organization and support by three measures. One of these required the townships to raise a sum at least equal to the apportionment from the State School Fund, and not more than double this amount, and thus made a local school tax mandatory. A second provision authorized townships to elect Township Superintendents, or Town Superintendents, as they were more generally called, whose duties were largely financial. These officials took the place of the Township Committees in the administration of school affairs. The third provision required the licensing of all public school teachers either by a Board of County Examiners or by the Town Superintendent.

During this period the city schools were in many cases organized according to special provisions in the city charters. In other cases the school boards were incorporated separately from the municipal government. In the townships after 1851 communities organized themselves into districts around a local school, each one with its own board of trustees. The school district thus grew into the prevailing type of local school unit, some districts being incorporated and others unincorporated. The township existed primarily for the purpose of distributing the state apportionment and for collecting census and attendance statistics. The income of the School Fund was apportioned to the counties in proportion to their population, and was apportioned by the counties to the townships in proportion to their school census. In 1851, at the same time that incorporation of school districts was authorized, the districts were likewise authorized to levy taxes to support schools, purchase land or build schoolhouses. The intent was probably to make the public schools free, but rate bills, or tuition charges, were employed in many districts for another twenty years.

In 1854 and 1855, important steps were taken to improve the training of teachers by the State. In the former year the law required the establishment of teachers' institutes. In the latter year the legislature established the first State Normal School at Trenton. The state assumed further responsibility for education beyond the high school level, when in 1863 it accepted the provisions of the first Federal Morrill Act, and in 1864 established the Rutgers Scientific School at Rutgers College to take care of the state's obligation under that act. This became the first unit toward the State University.

1866 and 1867 were of great importance to public education in New Jersey, especially in respect to the administration of the school system. In 1866 the legislature provided for the establishment of the State Board of Education, and gave it the power to elect the State Superintendent. In 1867 the school laws were revised and recodified. The office of township superintendent was abolished and provision was made for county superintendents to be appointed by the State Board of Education. The township system was abolished as a unit of control, and, except for the cities, small districts were created, the boundaries of which were to be determined by the county superintendents. The powers of the State Board were extended by requiring it to make rules and regulations for the carrying out of the provisions of the school law, and for examining and licensing teachers, and by giving them authority to hear and decide appeals from decisions of the State Superintendent.

In 1871 the schools of the state were rid of the rate bills and made entirely free. To ensure the raising of funds locally for this purpose the legislature provided for a State School Tax of 2 mills, to be distributed to the counties and local units.

The revision of the State Constitution in 1876 contained three provisions which affected public education. The first of these forbade donations of land or appropriations of money by the state or by municipal corporations for the use of any society, association, or corporation. A second provision required the legislature to provide for the maintenance of a system of free public schools for children between the ages of 5 and 18 years. The third prohibited the legislature from passing any private, local, or special laws for the management and support of public schools.

In 1889 and succeeding years a number of changes were made in the functions of the State Board. In that year the appointment of the State Superintendent was taken from that body and given to the Governor. In 1891 the State Normal School and the New Jersey School for the Deaf were removed from the control of separate bodies, and placed under that of the State Board. A similar measure in 1900 gave them control of the Manual Training and Industrial School for Colored Youth.

An important change was made in 1894 when the district school system, except for cities and special charter districts, was abolished by the Olcott School Bill, and the township system re-established for the rural areas. In 1900, by the Stokes Law, a further strengthening of the local units was made when all school systems in cities were placed under independent boards of education, which were made corporate bodies.

In 1903 another revision of the school law was made, and a code evolved which is the basic school law of the state today. In 1906 provision was made that a certain portion of the income from the Railroad Tax should be devoted to the support of the public school system. An act of 1907 made it mandatory upon school districts to provide ''suitable school facilities and accommodations'' and under the rulings of the State Superintendent, transportation of pupils under certain conditions thus became compulsory. In 1909 the Teacher Tenure Law was passed, giving protection to teachers after three years of continuous employment in one school district.

In 1911, upon the appointment of Dr. Calvin N. Kendall to the office of State Superintendent, a number of changes in state school administration were made. The office of State Superintendent became that of Commissioner of Education, and a functional organization of the Department of Public Instruction was set up under a number of assistant commissioners. At the same time the powers of the State Board were reorganized.

The compulsory education laws of 1913 and 1914 gave the state substantially its present provisions in respect to this matter. In the former year the legislature also made it possible to establish county boards of vocational education and county vocational schools.

In 1916 helping teachers for the counties were authorized. The same legislature gave the State Board of Education control of the degree-granting privilege in colleges.

As a result of the entrance of the United States into the World War, the 1917 legislature passed the physical training law which made it mandatory upon school districts to include such courses in their programs of studies. In the same year the state accepted the provisions of the Federal Smith-Hughes Law.

From 1918 on there appeared an increasing amount of legislation for the benefit of handicapped children. In that year school boards were authorized by law to transport children who were crippled or who were remote from the school.

In 1919 the Teachers' Pension and Annuity Fund was created, after an unsatisfactory experiment with a teacher retirement system under the Teachers' Retirement Fund created in 1896. The system established in 1919 was made compulsory to new teachers and was established upon an actuarial basis. In the same year was passed the minimum salary act, guaranteeing all teachers in the state a salary of at least $70 per month, as was also the continuation school law, by which provision was made for the establishment of these schools and for the attendance of employed children.

In the last decade a great deal of important school legislation has been placed upon the statute books. In the field of state school administration, the most important were the acceptance of the provisions of the Federal Rehabilitation Act in 1921; the creation of the Emergency Fund in the 10% Reserve Fund in 1922; the return of control of the Surplus Revenue Funds from certain of the counties to the state in 1923; the transfer in 1926 of control of State Normal Schools and of State Summer Schools for teachers from the State Board to the Commissioner of Education; the vesting in 1927 in the Commissioner of the supervision of all teacher training schools in the state supported wholly or in part by state funds; the vesting in 1929 in the Commissioner of Education of the control of changes in designation of high schools for attendance by pupils; and the creation in the same year of the State Board of Regents to perform important functions respecting higher education.

During the same period a number of measures made possible important changes in local school systems. In 1923 the legislature made possible the establishment of intermediate schools or junior high schools, and provided a special apportionment for teachers in such schools. In 1926 a revision of the teacher apportionment basis was made and provision made to encourage establishment of special classes for atypical children. This was supplemented in 1928 by a requirement that local boards of education establish special facilities for physically handicapped children under certain conditions. In 1929 tenure protection was extended under certain conditions to employees of school districts or public school organizations, when such employees were war veterans. An act of 1931 provided for regional boards of education, a measure which was designed to encourage the establishment of high schools by larger units than local rural school districts.

It is evident that the school legislation of New Jersey since 1817 has been directed toward two general ends. The first of these is the establishment in state bodies or officials of the responsibility for performance of functions which it was felt the state should perform. The other has been the expansion of the responsibility of the local school district for a wider variety of types of education, and the provision by law of the machinery for caring for such facilities. In other words, along with a differentiation of functions and of services, there has been an effort to locate in the law the responsibility for the provision and control of such functions and services.

CHAPTER II

THE NEW JERSEY THEORY OF THE RELATIONSHIP OF THE STATE TO EDUCATION

I. Introduction

This study does not assume that there is on the part of the state of New Jersey or of its legislature, nor even on the part of its leaders or citizens, a consciously accepted theory of the relationship of the state to education. Nor is it the claim of the writer that he is competent to set up such a theory, even in the light of all the material studied. In no single place has there been found an expression given in complete form to such a statement of principles. Here and there, however, in the State Constitution, in the school laws, in the decisions of the courts or of the school tribunals, and in the expressions of the educational leaders, may be found definitely enunciated certain parts or fragments of a pattern of thinking which tend to form a more or less related whole. It is the purpose of this chapter, therefore, to attempt to select these expressions or statements of relationship and to unite them into a group of principles which it is believed will be valid, although doubtless incomplete in scope.

II. The Interest of the State in Public Education and Its Responsibility

A. The State's Interest in Educating Its Children

Even in the early stages of state participation in education, recognition was given to two justifications for the state's interest. On the one hand, it was interested in ensuring to each individual child an opportunity for educational advantages, for the sake of the child's own welfare. On the other hand, the benefit to society and to the state itself of an enlightened citizenry was clearly recognized. These two viewpoints will be identified as our more modern terms of ''individual efficiency'' and ''social efficiency.'' In the 1849 report of the Superintendent of Public Instruction, these two viewpoints are thus expressed:

> Our citizens are beginning to consider the subject of the education of their children, not only as eminently deserving their own attention, but as entitled to the fostering care of the state.
>
> In many townships, public meetings have been called to consider the propriety of establishing free schools, that all the children, without distinction, might receive the benefit of a thorough and substantial education; and, believing that the benefit thus derived would be a common one, they think it but right that the expenses incurred thereby should be borne in common, or in proportion to the relative amount of property possessed by each individual.[1]

Governor Marcus L. Ward, who was ex-officio president of the State Board of Education, seems to have inclined rather strongly toward the individualistic conception of state interest, as is evidenced in his 1868 report:

> The object of our school law is to give to every child in the state an education sufficient to discharge the ordinary business of life. To do this, instruction must be free, and within reach of all.[2]

The importance of both viewpoints was recognized by State Superintendent Apgar (1867–1884):

> The principle upon which we found our public school system * * * is, that every child has a *right* to an education, and that it is the duty of the state to provide the means whereby he may obtain that right.[3]
>
> It being for the common good that all the citizens, so far as possible, shall be educated, it becomes a wise policy, on the part of the state, to place within the reach of all the opportunity of acquiring this education, and it is simply a matter of equity that the expenses incurred in maintaining the schools needed to impart this education, shall be borne by all alike.[4]

State Superintendent Baxter, in his report for 1900, reflects the social and civic view:

> The theory on which our public school system is founded is that it is for the benefit of the state, and not of the individual *per se,* that he should be prepared for citizenship, be educated sufficiently to do his work intelligently, and to add to the material prosperity of the community in which he lives. With this end in view, the state levies a school tax to be used for the equal benefit of all the people of the state.[5]

---

[1] State School Report, 1848: Report of State Superintendent, p. 5.

[2] State School Report, 1868: Report of President of State Board of Education, p. 8.

[3] State School Report, 1868: Report of State Superintendent of Public Instruction, p. 20.

[4] State School Report, 1878: Report of State Superintendent Apgar, p. 23.

[5] State School Report, 1900: Report of State Superintendent Baxter, p. 32.

B. The Responsibility of the State

Under the United States Constitution,

> * * * the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.[6]

It is generally conceded in this country that under this provision the power to establish and maintain public school systems, and to govern, control, and regulate them when established, is reserved to the states respectively or to the people. It is usual, therefore, for the public school system of any state to originate under the constitution of that state.[7]

Under the constitution of New Jersey as amended in 1875, the people of the State have made it mandatory that

> the legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years.[8]

Under this constitutional mandate it is evident that the people have accepted the theory that the state is the proper agency through which to establish a system of free public schools, and to provide for its support. In accepting this proposition, they furthermore designated the legislature as the appropriate body to carry this mandate into effect. At the same time, the constitution defined in certain respects the task of the legislature. These specifications were:

1. The public school system to be established was to be free;
2. It was to be thorough and efficient;
3. It must exist for the instruction of all—not part—of the children in the state between the ages of five and eighteen years;
4. Provision for its maintenance and support must be made by the legislature.

This responsibility of the legislature has also been upheld by the courts:

---

[6] Constitution of United States, Article X of the Amendments.

[7] Voorhees, H. C.: *The Law of the Public School System of the United States*, p. 3. Boston, Little, Brown and Company, 1916.

[8] Constitution of New Jersey, Article 4, Section VII, par. 18.

> The facilities for free public education are to be provided by the legislature, within the exercise of a sound discretion, subject only to constitutional restraints, which must be found in expression or clear implication.[9]

The same decision ruled that the constitutional provision was not to be regarded as a limitation of legislative power over the subject of free public schools, either in the matter of method of support, or in the matter of age limits of persons to be benefited by educational provisions made by the state, or in respect to types or grades of education which the state might establish. Subsequent to this decision, therefore, the legislature extended the privileges of free public education to all persons under twenty years of age, and made it possible for local districts to include persons both above and below these limits.[10]

The right of the legislature to go beyond the constitutional mandate was again upheld in the Newark case:

> There is nothing in the Constitution to forbid the legislature from providing for better school facilities than the Constitution itself requires.[11]

Under the constitutional mandate, the legislature has made provision through numerous acts for the organization and support of the school system. Part of this responsibility it assumed on its own part directly; part of it was delegated to school districts. The latter provision specified that

> * * * each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein.[12]

This act, and its supplements, and subsequent court decisions specified just what would be regarded as "suitable school facilities and accommodations."

In spite of constitutional and legal provisions, the extension of the public school system in New Jersey, as in other states, has frequently aroused opposition. One of the earlier decisions (1891) reflects this opposition, and established the constitutionality of legislation under which high schools could be maintained by a school district:

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[9] Trustees of Rutgers College v. Morgan, 70 N. J. L. (41 Vr.) 460, 57 A. 250.

[10] P. L. 1912, Chap. 183.

[11] In re Newark School Board, 70 A. 881.

[12] P. L. 1907, Chap. 123.

> The school laws are not rendered special or local, or otherwise unconstitutional, by the fact that under them a higher grade of education may be afforded to the children in one district than that offered to those in another.
>
> * * * * *
>
> Beyond the constitutional obligation there still exists the power of the legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public service. On this power, I think, rests the laws under which special opportunities for education at public expense are enjoyed.[13]

In his 1902 report, State Superintendent Baxter said:

> There is a mistaken notion too widely prevalent that the duty of the state is ended when it has provided instruction in the elementary branches, and that any further school advantages should be provided by the parents. A state tax for the support of public schools can be justified only on the ground that the education is for the benefit of the state. If this be true, then the broader the education the greater the mental development of the child and the greater the benefit to the state.[14]

In accordance with this viewpoint, Superintendent Baxter issued in 1905 a circular, the contents of which were approved by the Attorney-General and which was reprinted in his 1905 report, wherein school districts were definitely informed that they were responsible for the provision of high school facilities for their children, either in their own district, in conjunction with other districts, or by paying tuition fees in other districts. Only when one of these alternatives was accepted, could a district be considered to be providing "suitable school facilities."[15]

The importance of maintaining suitable school facilities for pupils of high school age was emphasized by Commissioner Kendall repeatedly. Year after year in his reports he repeated this statement:

> The schools are to be as free, thorough and efficient for pupils who are seventeen years of age as for those who are six.[16]

The right of the state to provide educational facilities beyond the secondary school level, under a co-operative agreement with

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[13] Landis v. School District, 57 N. J. L. (28 Vr.) 509.

[14] State School Report, 1902: Report of State Superintendent Baxter, p. XXX.

[15] State School Report, 1905, pp. XXIV–XXV.

[16] State School Report, 1919, p. 12.

Rutgers College, was approved by the courts in the so-called Rutgers College case:

> It was competent for the legislature to establish an agricultural college at Rutgers, and to support it out of the state's general fund, and the legislation on that subject is not infirm by reason of the constitutional provision against private, special or local legislation, or by reason of the further provision "that no donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation."[17]

This theory that New Jersey should follow the policy of using an existing institution for higher education as a center for the state's activities in that field, has been much extended, at least in its possibilities, by the functions assigned to the recently created New Jersey State Board of Regents. This body is given authority to determine to what extent any existing institutions of higher education, other than state institutions, shall be utilized by the state, in whole or in part, in meeting its needs in respect to higher education, and to contract with any such institutions on behalf of the state for any current services of public higher education.[18] This makes it evident that the state holds to the theory that it is the business of the state to provide either through state institutions or through non-public institutions for those types of higher education demanded to meet the needs of its citizens.

The state of New Jersey has also, since 1855, considered it a part of its responsibility to provide institutions for the training of its public school teachers and to maintain and manage such institutions. In order that the training offered therein might meet the ends of a state school system, the legislature has always kept the supervision of these schools and the authority to organize their programs of study in the hands of state agencies.

III. THE NEW JERSEY THEORY OF THE SUPPORT OF EDUCATION

A. The Function of State Subsidies for Education

1. The Stimulation Theory

After the establishment of the State School Fund in 1817, the income came to be appropriated to the school units of the state without obligation upon the part of the latter. The legislature made it possible for districts to raise additional funds by local tax, but the early reports of the Trustees of the School Fund and of the State Superintendents make it evident that most school districts supported their schools entirely out of their share of the income of the State School Fund, or supplemented this means of support by rate bills. The 1839 report of the Trustees of the School Fund suggested as a new principle that the function of the School Fund through appropriation of its income was the stimulation of local effort:

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[17] Trustees of Rutgers College v. Morgan. See footnote 9 *supra.*

[18] P. L. 1929, Chap. 76.

> Education should be placed within the reach of all; but some effort should be required, some sacrifices called for, in order to obtain it. Without this, the people will not be very likely to take much interest in it, or to give themselves much care about it. An education gratuitously bestowed, and thanklessly received, would probably not prove to be a very thorough or beneficial one. Now, the great object of a school fund is to excite this effort, to awaken this interest. And the only way in which this object can be accomplished, is by permitting none to participate in it but those who are willing to contribute something towards it.[19]

This theory became that of the state in 1846, when the law compelled districts to raise by tax an amount equal to that appropriated from the income of the School Fund, if they desired to benefit.

The theory of stimulation should be extended to cover all state subsidies for education, in the view of the President of the State Board of Education, in 1868:

> Every encouragement should be given by the state, through enlarged provisions for education, to induce a corresponding liberality and spirit of emulation on the part of the people. When the state affords a generous aid, the people will be also stimulated to greater efforts to advance the interests of the schools.[20]

2. The Theory of Divided Responsibility

In the last quarter of the 19th century, it was represented by State Superintendent Apgar that the state's appropriation was intended to cover certain school expenses, and local funds were to cover other items:

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[19] Annual Report of Trustees of the School Fund, 1839, p. 10.

[20] State School Report, 1868: Report of State Superintendent, p. 8.

> The spirit of the school law of New Jersey is, that the state shall furnish the means for maintaining the schools, while the local authorities shall provide suitable school accommodations.[21]

Whether this theory was fully carried out in application of state school funds cannot be established.

Since the same principle was enunciated by Commissioner Kendall in 1910, it may be assumed that it was more or less widely prevalent in the state. His statement was:

> The education of the masses is of so vital importance to society and to the state that many intelligent citizens incline to the belief that no portion of the support of the schools of any district should ever be dependent upon the measure of correct educational sentiment that shall happen to prevail therein. In their opinion both the proper and the ideal arrangement is for the state to assume the entire outlay required for the ''current expenses'' of the schools and for the school districts to provide the ''suitable and adequate school accommodations''; the furnishing of said accommodations to be, in the case of each district, a condition precedent to receiving its equitable share of state support.[22]

3. The Theory of Equalization

The more recent theory that the function of the state in its appropriations for public education should be to equalize both educational opportunity and the burdens of school support, was expressed by Commissioner Enright. Concerning the equalization of educational opportunity, he said:

> The state's function in carrying out the provisions of the Constitution is to furnish the means to provide equal educational opportunities for every child in the state no matter how remote he may live from centers of wealth. * * *
>
> It has seemed to many that a very fair proposition would be that the state furnish at least 50 per cent. of the revenue and the local district bear the burden of the other 50 per cent., always leaving, in true democratic spirit, the management and control with the local district, and the state entering only to see to it that the local district provides the proper school facilities in order that an equal opportunity for education may be furnished to every child.[23]

A more specific application of this theory was reported by Commissioner Enright in 1924:

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[21] State School Report, 1881: Report of State Superintendent Apgar, pp. 41–42.

[22] State School Report, 1910: Report of Commissioner Kendall, p. XVIII.

[23] *Education Bulletin*, Vol. 9, No. 8, April, 1923, p. 135.

> Another notable event in school administration that occurred during the present year was a recognition of the state's responsibility to help financially the poorer school districts of the state. For the first time, the State Board of Education in its apportionment of the Reserve Fund made a study of the financial necessities of the school districts, as well as a study of the financial ability of the different sections of the state, with a view to apportioning the Reserve Fund on a more equitable basis.[24]

It is evident that New Jersey legislatures have recognized the validity of the principle of stimulation. State subsidies for such forms of education as manual and industrial training, vocational education, and industrial schools; and for such school officers as county supervisor of child study, county medical inspector, and county attendance officer, are based upon the idea of recognizing or stimulating local effort. Similar encouragement is offered to school districts in the form of higher apportionment for supervising principals, teachers of special classes for atypical children, and supervisory assistants, than for ordinary classroom teachers, and in the form of an apportionment of 75% of the cost of approved transportation for pupils. Likewise, the creation of the Reserve Fund to be used at the discretion of the State Board for help to the poorer districts is evidence that the equalization principle has been recognized as valid.

B. The Control and Ownership of School Funds, and the Legal Authority for Taxation

As early as 1859 expression was given by the New Jersey courts to the principle that all school moneys are in fact the property of the state, no matter whether they exist in the form of state funds or revenues, or whether they are derived from local taxation. In that year Mr. Justice J. Vredenburgh of the State Supreme Court gave expression to the so-called "conduit pipe" theory of control of the state apportionments, and supplemented this by declaring all public school funds from whatever sources to be state funds:

> As regard the funds derived from the state, the freeholders, the township collectors, and the superintendents [who served as local distributor] are but the conduit pipes from the state treasury to the local teachers, and they are just as much the property of the state after they get into the

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[24] State School Report, 1924: Report of Commissioner Enright, p. 14.

hands of the school superintendent as they were in the state treasury; and the fact that, in going down, they happen to flow through the hands of the township collectors, gives the township corporation no rights in the fund.

As regards the funds raised by the township, when they once get into the hands of the school superintendent, they, also, are no longer township, but state funds. They are placed into the hands of the town superintendent by the state's orders, and to answer state purposes. They are paid out under the orders of the state. The school superintendent is not accountable for the administration of the funds to the townships, but to the state authorities. * * *

It is the favorite policy of the state to educate all her children. She passed the school law for that purpose; she raises her funds, in part, from the interest of the school fund, in part from the state funds, in part from the surplus revenue, in part from township taxation. But the money is all, when it once gets into the hands of the township superintendent, the state's money for the purpose of education. The township taxation is only the instrument whereby the state raises this portion of the funds. It is paid over, by the town collector, under the mandate of the statute, to the agent of the state, to wit, the school superintendent, to subserve a great object of state policy, to wit, the education of her people.[25]

The source of power to tax is in the people:

The right of taxation is vested in the people, but legislation is necessary to exercise the power of taxation.[24]

The people through the legislature may delegate this power, but does not thereby lose control over it:

The legislature, in the exercise of its soverign power, may confer upon the minor political subdivisions of the state (which are merely instrumentalities for the better administration of the government in matters of local concern) power to impose and levy taxes and assessments to provide the revenue by which municipal expenses are borne and debts and liabilities paid, on the principle that for local purposes the local authorities are the representatives of the people.[26]

In accordance with this principle, and in agreement with the Morris Township decision, which was just quoted, all taxes, however levied, are state taxes:

All taxes, whether levied for state, county or municipal purposes, are state taxes; they can be imposed by no other authority than that of the state, and the state appropriates the proceeds to whatever purposes it sees fit.[27]

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[25] Township of Morris v. Carey, 27 N. J. L. (3 Dutch.) 377.

[26] Bernards v. Allen, 61 N. J. L. (36 Vr.) 228, 39 A. 716.

[27] State Board of Assessors v. Central R. R. Co., 48 N. J. L. (19 Vr.) 146, reversing 48 N. J. L. (19 Vr.) 1.

In levying and distributing the state school tax, the state is engaging in an activity which is at all times under its control, no matter what agency may be employed:

> The people of this state, by the amendment to the constitution which we have cited (1875, const., art. 4, § 7, par. 6) made the maintenance and support of free public schools a matter of state, instead of local concern. The school tax is laid for the purpose of carrying out this state system of educating our children; it is used for that purpose; and such a use, in our opinion, is as much a state use as the appropriation of moneys to be expended in the support of the state government is an appropriation for a state use; the distribution by the state of the moneys so raised, in such a way as, in the judgment of the legislature, would best subserve the purpose of the constitutional mandate being a mere matter of administration.[28]

IV. THE NEW JERSEY THEORY OF CONTROL OF THE SCHOOL SYSTEM

The functions of control in the New Jersey school system are exercised through three distinct governmental units, and may be termed direct state control, county control, and local school district control. The exercise of control on the county level is chiefly in the hands of the county superintendent of schools, although there are several additional agencies which operate in certain counties. The county superintendent, however, is not, properly speaking, a county official, but a state official:

> The County Superintendent is essentially a state official, appointed by state authorities, and paid from state funds, not from county funds. He is the representative of the state, working in the county.[29]

Similarly, school districts, which have been held to be distinct municipal corporations,[30] are simply the creatures of the state and possess only such powers as are given to them by the state,[31] which may withdraw or abridge the powers conferred within constitutional limitations.[32]

It is evident, therefore, that the New Jersey theory of control of its school system is that the state is the source of power and of control, and that it can at any time alter the degree of control which it has delegated to the subordinate units.

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[28] Society v. Paterson, 89 N. J. L. 208, reversing 88 N. J. L. 123.

[29] State School Report, 1912: Report of Commissioner Kendall, p. 82.

[30] Arnold v. Board of Education of Ewing township, S. L. D., p. 17, decision of Com. of Ed.

[31] Federal Shipbuilding and Dry Dock Co. v. City of Bayonne, 141 A. 456, decree affirmed 144 A. 918.

[32] State Highway Commission v. Elizabeth, 102 N. J. Eq. 221.

V. THE NEW JERSEY THEORY OF THE ADMINISTRATION AND SUPERVISION OF PUBLIC EDUCATION BY THE STATE

Just as the actual balance of power in respect to control of the state school system lies in the hands of the state, so the legislature has held to the theory that the general principles of administration should be outlined by state law or by the rules of the State Board of Education, and the local unit should beyond those limits be given rather wide powers in matters of school policy. These powers of local boards, however, have in the last twenty years been somewhat restricted, especially in respect to the selection, salary, and tenure of the teaching staff, the provision of school facilities, and the program of studies of the schools. In some cases these local powers have been modified by law, in others by the rules of the State Board. The general result has been a greater concentration of control in the hands of the state agencies. The theory of the state seems to have been that for the development of uniformly higher standards of school efficiency, it was necessary to express these standards in such form that all local units would be required to meet them.

To this end the Commissioner of Education has within recent years been given supervision of all teacher training schools of the state which receive state aid,[33] and has been given authority to prescribe a minimum course of study for both elementary and secondary schools.[34] Likewise the State Board of Education has set up a School Building Code, to which all school districts must adhere; has been given control of licensing of degree-granting institutions,[35] and has been given control of the approval of provisions for practically all of the types of special schools and classes for which the legislature has provided within recent years. The Department of Public Instruction has been expanded in personnel, especially since 1921, by the provisions for additional assistant commissioners of education and of certain inspectors, through whom the new functions given to the state agencies were to be performed.[36] Similarly, supervisory functions in respect to local schools have been performed by helping teachers, under an act of 1920. While the helping teachers are attached in a sense to the offices of the county superintendents, they are appointed by the Commissioner of Education, are paid out of state funds, and are essentially state supervisors.[37]

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[33] Code, Sec. 10 (I).
[34] Code, Sec. 9 (XI).
[35] Code, Secs. 619–621.

The New Jersey theory concerning the administration and supervision of the state school system would therefore seem to be that the state must exercise a rather far-reaching influence and control over its various functions, in order that sufficiently high standards may be maintained to guarantee to every child in the state the use and enjoyment of ''suitable school facilities and accommodations.''[38]

VI. THE STATE'S PURPOSE IN PROVIDING BENEFICIAL LEGISLATION FOR SCHOOL EMPLOYEES

Teachers and other employees have sometimes regarded legislation which provides certain benefits for them, as existing primarily for their welfare. This is not the view of the courts nor of the Commissioner of Education. In their view, the correct theory is that these benefits exist primarily for the betterment of the public school system. One expression of this theory came in a decision of the State Supreme Court in a case to test the constitutionality of the Teachers' Retirement Fund, which preceded in existence the Teachers' Pension and Annuity Fund:

> The creation of this fund was an important public measure, which may well be considered as tending to make the system of free schools established by the act thorough and effective by rendering the position of teacher a more desirable one because of the advantages arising out of the fund. It was a public scheme designed for the betterment of a branch of the service.[39]

The second expression of this theory was made by the Commissioner of Education concerning the Teacher Tenure Law. This was legislation, he said,

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[36] Code, Sec. 9.
[37] Code, Sec. 20.
[38] Code, Sec. 196.
[39] Allen v. Board of Education, 79 A. 101.

* * * which, according to an opinion of the Attorney-General, was enacted not as a matter of personal privilege, but of public policy for the benefit of the school system.[40]

VII. The State and Private Schools and Colleges

The state is interested in non-public schools and colleges for several reasons.

A. Such institutions are exempt from taxation if not conducted for profit, provided they own their own property, and are incorporated under the laws of the state;[41]

B. If they are institutions of higher learning, and desire to grant degrees, they must be licensed for that purpose by the State Board of Education;[42]

C. They may receive pupils of compulsory attendance age, and in doing so have certain contacts with school authorities;[43]

D. Private schools of secondary school grade, if they desire their graduates to be admitted to State Normal Schools under the same conditions as graduates of public high schools, must be registered with the Department of Public Instruction. To be accorded the privilege of registration, such schools must consent to inspection by a representative of the Department of Public Instruction, must be under the management of a corporate body, board of trustees, or other responsible control, and must in all other respects meet the standards prescribed by the State Board of Education for public high schools;[44]

E. Each private school in the state is required to report annually to the Commissioner of Education such statistics relating to such school as the Commissioner may require, except that no report concerning finances may be required. No report of any private school may be made public by the Commissioner.[45]

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[40] White v. Board of Education of borough of Hillsdale, S. L. D., p. 124, decision of Com. of Ed., Nov. 2, 1926.

[41] P. L. 1929, Chap. 42, amending Act of Mar. 4, 1918.

[42] Code, Secs. 619–621.

[43] Code, Sec. 231.

[44] Rules, Nos. 60–61, p. 506.

[45] Code, Sec. 28.

It seems evident from these provisions that the state is not inclined to interfere with private institutions of learning nor to dictate to them concerning their programs of studies, unless they desire to exercise certain privileges which affect the public interest. Such privileges are those of admission to state institutions of learning, or of granting of degrees. Even in the matter of attendance of pupils in private schools it is not clear that the state has any authority to require the co-operation of such schools to insure regularity. Nor does it seem that school offerings equivalent to those required in public schools can be required by the state under present laws, except in the case of registered private schools of secondary grade. The New Jersey theory in respect to the proper relationship of the state to such schools seems to be that the latter should be accorded immunity from taxation, as institutions performing a social or charitable purpose, and that they should be subject to regulation only when they desire to secure recognition from the public for their graduates, either by granting them degrees or by securing their admission to state institutions of learning.

VIII. SUMMARY

A search for an underlying theory of the nature of the relationship of the state to education in New Jersey, discloses a number of significant points, expression to which is found in the constitution and the laws, in decisions and rules, and in the reports or opinions of state officials. Fundamental to all parts of this theory is the conception that the state is interested in education primarily for selfish reasons, since education is necessary to the continued existence of the democratic state. The following statements form a more or less connected picture of the theory of this relationship:

A. The state is interested in education, not only for the sake of the child's welfare, but also because of the benefit which accrues to society and to the state through an enlightened citizenry.

B. The state as the proper agency to assume responsibility for public education, is bound to see to it that suitable school facilities are provided for all children of the state up to and including the secondary school level, and is likewise bound to see that facilities for higher education are provided at least to such an extent as will meet the needs of the state.

C. State contributions to education in New Jersey are on the one hand an evidence of the state equity in the system, and at the same time serve to stimulate local effort, and to equalize the burdens of expense among school districts of varying degrees of financial competency.

D. All funds provided for public school purposes, either by the state or through local taxation, are in essence state moneys, raised under state authority for a state purpose.

E. The state is the source of all power of control in the public school system, and may delegate powers to subordinate units, and withdraw them at will.

F. The state must assume a sufficient portion of the responsibility for the administration and supervision of the public school system to ensure the attainment of those standards of efficiency necessary to ensure to every child in the state the enjoyment of suitable school facilities and accommodations.

G. The state provides beneficial legislation for its employees only to assure a more thorough and effective school system, not primarily for the benefit of the employees.

H. The state is interested in private education only to the extent that it should be able to protect the rights of the public at such points as affect the public interest.

CHAPTER III

STATE AGENCIES IN EDUCATION AND THEIR FUNCTIONS

I. Introduction

Since New Jersey has maintained the theory that the state has the primary responsibility in providing for the education of its children, it becomes advisable to find to what extent this responsibility and authority is retained in the hands of the state itself, and the extent to which it is delegated to subordinate units and bodies. The purpose of this chapter is to ascertain the functions which are in the hands of the state, and to describe in certain cases the manner in which they are performed.

In order to perform the purely educational functions which the state is to assume, the legislature has provided for the following bodies and officials:

A. The State Board of Education;
B. The Commissioner of Education, and the Department of Public Instruction;
C. The State Board of Examiners;
D. The Board of Visitors of the State University;
E. The New Jersey State Board of Regents;
F. The Trustees for the Support of Public Schools.

The functions of the State Board of Examiners will be discussed under the head of teacher certification in the chapter upon "The Legal Status of Teachers, Supervisors, and Principals."[1] The Board of Visitors and the State Board of Regents will be discussed in the chapter upon "The Relation of the State to Higher Education and to Special Forms of Education."[2] The Trustees for the Support of Public Schools, commonly known as the Trustees of the State School Fund, will be discussed in the chapter on "The Legal Basis of Financing Public Education."[3]

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[1] See Chapter X, pp. 283–285.
[2] See Chapter IV, pp. 57, 60, 61–63.
[3] See Chapter VIII, pp. 202–205.

This chapter will therefore present a discussion of the State Board of Education, and of the Commissioner of Education and the Department of Public Instruction.

There are, it is true, certain educational functions performed by other state bodies or officials, not in the capacity of educational bodies, but in connection with their duties in their respective fields. Such bodies and officials are the Governor, the State Comptroller, the State Treasurer, the Attorney-General, the Commissioner of Labor, the Commissioner of Municipal Accounts, the State Board of Health, the Commissioner of Banking and Insurance, the Adjutant General, the Commission for the Rehabilitation of Physically Handicapped Persons, and the Civil Service Commission. The educational functions performed by these officials and bodies, and others, will be shown as they appear in this and other chapters.

II. THE STATE BOARD OF EDUCATION

The State Board of Education is the body charged by the legislature with a major portion of the responsibility for the administration of the state program in public education. To enable it to administer this program it is also vested with certain legislative powers, and to enable it to interpret the provisions of the school law it has been given the power to adjudicate disputes, generally upon appeal from the Commissioner of Education, but in a few cases as the court of direct appeal.

A. Membership on the State Board of Education

The State Board of Education consists of ten members, of whom at least two must be women, and not more than five of whom shall be members of the same political party. They must be citizens, must have been residents of the state for at least five years preceding appointment, and not more than one of them shall be a resident of any one county. They are appointed by the Governor with the advice and consent of the Senate for terms of eight years, one or two being appointed each year, as may be determined by rotation.[4] The law provides that vacancies shall be filled for the unexpired term.[4] This provision is subject, however, to the constitutional provision explained in the following:

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[4] Code, Sec. 1.

Const., art. 5, par. 12, provides that "when a vacancy happens during the recess of the legislature in any office which is to be filled by the governor and senate, or by the legislature in joint meeting, the governor shall fill such vacancy, and the commission shall expire at the end of the next session of the legislature unless a successor shall be sooner appointed." Held, that the governor might in the recess make an appointment to fill the office temporarily, where the vacancy first began during the session of the legislature.[5]

It is evident therefore that if a vacancy arises during a recess of the legislature, or even if it arises while the legislature is in session but without being filled during such time by the governor with the advice and consent of the senate, the governor may fill the position temporarily, and such appointment will carry until the end of the succeeding session of the legislature, unless during such session the governor and senate appoint some person for the unexpired term.

Members of the State Board receive no compensation, but upon the warrant of the State Comptroller are paid their necessary expenses by the State Treasurer.[6]

B. Organization and Meetings

The school law empowers the State Board "to frame and modify by-laws for its own government; to elect its president and other officers . . ."[7] Under its by-laws thus authorized the State Board has provided for a president, a vice-president, and a secretary.[8] Under the school law the Commissioner of Education is ex-officio secretary of the Board.[9] The president and vice-president are elected at the June meeting annually for a one-year term and take office on the first Saturday in July following.[8] The State Board year may therefore be said to begin on the first Saturday in July.

Under its own by-laws the work of the State Board is performed at least in part through its nine standing committees, namely: Advisory; Law, Appeals and Legislation; Vocational Education; Normal Schools and Teachers; New Jersey School for Deaf; Manual Training and Industrial School for Colored Youth; Finance and Administration; Housing and Health; Rural Schools. Each committee consists of three members and is appointed by the president for a one-year term at the first regular meeting subsequent to his election. Under the by-laws of the Board no officer or committee has authority to employ any person except temporarily to fill vacancies. Each committee reports at each regular monthly meeting of the Board. The president of the Board is its chief executive officer, and is ex-officio a member of all committees. All bills and payrolls approved by any committee must be certified to him and countersigned by him in order to be paid.[10]

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[5] State ex rel. Fritts v. Kuhl, 51 N. J. L. (22 Vr.) 191, 17 A. 102.

[6] Code, Sec. 6.

[7] Code, Sec. 4 (I).

[8] By-Laws, No. 3, p. 525.

[9] Code, Sec. 17.

The State Board holds its regular meetings on the first Saturday in each month at the State House in Trenton. Special meetings are called by the president when he thinks it advisable, or upon the request of any three members. Members must be given five days' notice of each regular meeting and three days' notice of each special meeting. A majority of the total membership, or six members, constitutes a quorum. The vote of a majority of the total membership is necessary to elect any officer or appointee or employee of the Board.[11] It is to be assumed that only an affirmative vote of a majority of those present and constituting a quorum is required in other cases. The meetings of the Board are public and under the school law must commence not later than 8.00 P. M.[12] The by-laws specify that the regular meetings shall begin at 11.30 A. M.[11]

C. Functions of the State Board of Education

The functions of the State Board may be described as of three types: administrative, legislative, and judicial. In both its administrative and legislative capacities, it may under the law assume in some instances complete authority, while in other cases it approves of the acts of other officials or bodies, generally the Commissioner of Education. Since its function of approving acts initiated by the Commissioner is closely tied up with the authority of that officer, the discussion of this function is described in the section of this chapter pertaining to the Commissioner.

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[10] By-Laws, Nos. 4, 8 and 10, p. 525–526.
[11] By-Laws, No. 20, p. 526.
[12] Code, Sec. 1.

1. Administrative functions of the State Board of Education are as follows:
    (a) Relative to State educational activities.
        (1) Have general supervision and control of public instruction;[12]
        (2) Act as State Board for Vocational Education under the state law accepting the provisions of the Federal Act for Vocational Education (Smith-Hughes Act); certify the disbursements under this law to the State Comptroller and carry out the purposes of the act;[13]
        (3) Act as State Board for Vocational Rehabilitation under the state law accepting the provisions of the Federal Civilian Vocational Rehabilitation Act, and co-operate with the State Commission for Rehabilitation of Physically Handicapped Persons and with Workmen's Compensation Bureau to carry out the purposes of the law;[14]
        (4) May take and condemn land;[15]
        (5) Shall conduct school and other building operations within its direct supervision and all construction or repair work allied thereto;[16]
        (6) May employ technical assistants, with the approval of the State House Commission, for building operations (architects, engineers, etc.);[16]
        (7) Shall appoint the members of the State Board of Examiners;[17]
        (8) May appoint suitable persons to assist in and encourage establishment of evening schools for foreign born;[18]

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[13] Code, Secs. 453–455.

[14] Code, Secs. 482–484.

[15] Code, Secs. 2 (VII) and 315.

[16] Code, Sec. 2 (VII).

[17] Code, Sec. 42.

[18] Code, Sec. 225.

(9) Have control and care of buildings and grounds and the management and administration of the New Jersey School for the Deaf and of the Manual Training and Industrial School for Colored Youth;[19]

(10) Control the admission of pupils to Model Schools;[20]

(11) Receive copies of certificates of incorporation of private institutions for higher education and grant licenses to such institutions to grant degrees;[21]

(12) Receive application from institution of higher learning and approve its basis for granting degrees, and revoke same for proper cause;[22]

(13) Shall apportion the 10% Reserve Fund of the State School Tax annually;[23]

(14) Shall have control of approval of courses of study and certification of teachers of schools in State Prison; and receive copy of annual report of such schools;[24]

(15) May permit municipalities to use lands under control of State Board for recreational purposes;[25]

(b) Relative to educational activities in counties and school districts.

(1) May make resolution that need exists in any county for a county vocational school and transmit copy to county board of chosen freeholders;[26]

(2) Have control of approval of establishment of intermediate schools;[27]

(3) Have control of approval of secondary schools;[28]

(4) Have control of approval of establishment, location, rules for government and management and for courses of study for special schools of instruc-

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[19] Code, Secs. 307, 311.

[20] Code, Sec. 195.

[21] Code, Sec. 619.

[22] Code, Secs. 620–621.

[23] Code, Sec. 270.

[24] Code, Secs. 578, 579, 583.

[25] Code, Sec. 5.

[26] Code, Sec. 432.

[27] Code, Sec. 331.

[28] Code, Sec. 2 (III).

tion for dependent and delinquent children and shall receive report annually from same;[29]

(5) May require a district having school accommodations to receive pupils from another district;[30]

(6) Fix rates for tuition for elementary school grades or for special schools for dependent and delinquent children when districts cannot agree;[31]

(7) Approve appointment of supervising principal in a school district, and, upon application, appoint a supervising principal for two or more districts;[32]

(8) Approve courses of study of City Normal Schools;[33]

(9) Approve courses of study in manual training;[34]

(10) Approve courses of study in evening schools for foreign born;[35]

(11) May determine when course of study in physical training for boys in a school district shall include military training;[36]

(12) Approve rules of local board for government of medical inspector and nurse;[37]

(13) Shall prescribe uniform and simple system of bookkeeping for school districts and compel its use;[38]

(14) Shall approve the amount determined by the sinking fund commission of a school district for retiring school bonds;[39]

(15) May withhold state school moneys from district whose custodian of school moneys fails to notify Board of Trustees of Teachers' Pension and Annuity Fund of election of teacher and to deduct proper amount from salary;[40]

(16) Shall approve all plans and specifications for school buildings and receive and file copy of plans, specifications, and building contracts.[41]

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[29] Code, Secs. 498, 502, 504.

[30] Code, Sec. 2 (IV).

[31] Code, Secs. 2 (IV) and 496.

[32] Code, Secs. 2 (II) and 131.

[33] Code, Sec. 44.

[34] Code, Sec. 316.

[35] Code, Sec. 221.

[36] Code, Sec. 411.

[37] Code, Sec. 335.

[38] Code, Sec. 2 (I).

[39] Code, Sec. 370.

[40] Code, Sec. 545 (4).

[41] Code, Sec. 200.

2. Legislative functions of the State Board of Education (the power to establish rules and regulations) are as follows:
   (a) Relative to state educational activities:
      (1) May frame and modify by-laws for its own government;[42]
      (2) May prescribe and enforce rules and regulations necessary to carry into effect the school laws of the State;[42]
      (3) May make and enforce rules and regulations for the examination of teachers, and the granting of certificates or licenses to teach;[43]
      (4) Shall adopt regulations fixing the necessary qualifications of teachers of physical training;[44]
      (5) Shall make rules and regulations for the government and management of the New Jersey School for the Deaf and of the Manual Training and Industrial School for Colored Youth, and for admission of pupils thereto;[45]
      (6) May make regulations governing the issuance of scholarships to students by county superintendents for the Manual Training and Industrial School for Colored Youth;[46]
      (7) May prescribe rules and regulations for holding teachers' institutes.[47]

Under its general power to make rules and regulations to carry into effect the school laws of the state, the State Board in 1912 adopted a School Building Code. When some question arose as to the power of that body to enact such a building code, an opinion was sought from the Attorney-General. His opinion was that the State Board acted within its legal rights in the adoption of such a code, if it were reasonably designed to provide suitable school facilities and accommodations as provided by law. He ruled also that the State Board was within its legal right in extending the operation of the code to faulty conditions sanctioned before the code went into effect. As to its method of enforcing such a code, he advised that while the State Board was given power to enforce its rules and regulations, the method of enforcement must be found in the statutes. The only method given the State Board itself is through its right to approve plans and specifications. Another section of the law provides a penalty on a district failing to perform a duty imposed by the school law or by the rules and regulations of the State Board. In this case, the Attorney-General noted, the initial step to enforce the penalty is taken by the county superintendent with the approval of the Commissioner of Education.

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[42] Code, Sec. 4 (I).
[43] Code, Sec. 4 (IV).
[44] Code, Sec. 414.
[45] Code, Secs. 307, 311.
[46] Rules, No. 24, p. 498.
[47] Code, Sec. 4 (II).

On the question of the personal responsibility of members of the State Board in the adoption and enforcement of rules and regulations for a building code, the Attorney-General said:

> The adoption of your code and its application in particular cases involves the exercise of a function by your Board which is, in part, quasi judicial in character. I think the law is well settled that whatever you may do under such circumstances, if done with an honest purpose and in an honest conscientious effort to exercise the discretion and duty involved by the statute, will in no way involve personal responsibility.[48]

(b) Relative to educational activities in counties and school districts:

 (1) Shall prescribe rules and regulations covering the appointment of supervising principals;[49]

 (2) Shall prescribe rules and regulations governing the organization, management, maintenance, and control of vocational schools, under both county vocational boards and under local boards of education;[50]

 (3) Shall prescribe rules for the proper control and management of evening schools for foreign born;[51]

 (4) May adopt rules governing the management, control, and approval of courses in industrial education or manual training in school districts;[52]

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[48] Minutes of the State Board of Education, Nov. 1, 1912.

[49] Code, Sec. 131.

[50] Code, Secs. 426, 432.

[51] Code, Sec. 221.

[52] Code, Sec. 317.

(5) Shall adopt rules and regulations prescribing duties of county medical inspectors.[53]

3. Judicial functions of the State Board of Education.

The school law gives the State Board rather wide powers in matters in which it has judicial functions. These functions are directly associated with its power to hear and decide appeals upon matters arising under the school law. Appeals are generally carried to the State Board from decisions by the Commissioner of Education.[54] In one instance at least, however, appeals may be brought to this body directly without decision by the Commissioner. This procedure is prescribed by law when an applicant for disability retirement appeals from a decision of the board of trustees of the Teachers' Pension and Annuity Fund,[55] and is followed, presumably, because the Commissioner is ex-officio a member of the board of trustees.

In order to carry out effectively its right to give hearings and to make decisions, the State Board is clothed with a number of supplementary powers:

(a) It may require the production before it or before any of its committees, or before the Commissioner of Education or of his assistants, of any official papers and records, and may compel attendance at a hearing of any member of a board of education or of any person in the employ of a board;[56]

(b) It may suspend from office any person refusing to attend a hearing or to submit official papers and records;[56]

(c) It may issue subpoenas signed by its president and secretary compelling the attendance of witnesses and the production of official records and papers at such a hearing;[57]

(d) It may, by its presiding officer, committees, their chairmen, the Commissioner of Education, or any Assistant Commissioner, administer oaths and examine witnesses under oath.[58]

The operation of the machinery set up by law for securing a hearing and for disposing of cases will be discussed elsewhere in this chapter.[59]

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[53] Code, Sec. 518.

[54] Code, Sec. 4 (III).

[55] Code, Sec. 542 (6).

[56] Code, Sec. 2 (V).

[57] Code, Sec. 2 (VI).

[58] Code, Sec. 12.

[59] See pp. 46–48.

III. THE COMMISSIONER OF EDUCATION AND THE DEPARTMENT OF PUBLIC INSTRUCTION

The office of Commissioner of Education in New Jersey is one of great consequence and responsibility. The office was first created in 1845 under the title of State Superintendent of Public Instruction, and upon the appointment of Commissioner Calvin N. Kendall in 1911 the title was changed by law to its present form. The Commissioner is appointed by the Governor, by and with the advice and consent of the Senate, for a term of five years. The law makes it clear that he is to be selected without regard to whether he resides within or without the state.[60] His annual salary is fixed at $15,000.[61] His office, to be known as the Department of Public Instruction, is to be provided for him in the State House at Trenton,[62] and the necessary expenses of that department are to be paid out of the Railroad Tax.[63]

In the following outline of functions, those duties or powers which are to be performed by him subject to the approval of the State Board of Education are indicated by an asterisk (*). For those not so marked he is by virtue of his office responsible.

A. Administrative Functions

1. Functions directly connected with the operation of the Department of Public Instruction.
    - *(a) Appoint five assistant commissioners of education at annual salaries of $7,000, one of whom is to be designated to act for the Commissioner in his absence, and to designate for them special functions, respectively, as supervisors of secondary education, elementary education, industrial education, and of business matters, and one to hear all controversies and disputes which may arise under the school law or under the rules and regulations of the State Board of Education;[64]
    - *(b) Appoint an inspector of buildings;[65]

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[60] Code, Sec. 8.

[61] P. L. 1929, Chap. 89.

[62] Code, Sec. 15.

[63] Code, Sec. 508.

[64] Code, Sec. 9 (II–VII).

[65] Code, Sec. 9 (VIII).

- *(c) Appoint an inspector of accounts;[66]
- *(d) Designate one of the clerks in the Department of Public Instruction to perform the clerical work of the State Board of Education;[67]
- (e) May employ such clerks for his department as necessary and fix their compensation within such a total as is appropriated by the legislature;[68]
- (f) Shall adopt and provide an official seal;[69]
- (g) Shall turn over to his successor the official seal together with the property, books, official documents and records of the office;[70]
- (h) Shall keep records of all his official acts and copies of all decisions made by him;[71]
- *(i) Shall appoint such experts as are necessary to carry out provisions of physical training act.[72]

2. Functions in relation to State Board of Education.
   - (a) Shall be ex-officio Secretary of the State Board;[73]
   - (b) Shall attend meetings of State Board, keep record of its proceedings, have custody of its books and papers, notify its members of all meetings, notify committee members of all matters referred to such committee;[74]
   - (c) Shall make reports to the State Board monthly, annually, and at such other times as designated;[75]
   - (d) Enforce rules and regulations of the State Board;[76]
   - (e) As Secretary of State Board, shall forward to the Governor copies of the minutes of the State Board as printed.[77]
3. Ex-officio membership in other state bodies.
   - (a) Trustee of State School Fund;[78]
   - (b) Member of State Board of Examiners;[79]
   - (c) Member of Board of Trustees of Teachers' Pension and Annuity Fund; he may appoint in his stead the

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[66] Code, Sec. 9 (IX).
[67] Code, Sec. 9 (I).
[68] Code, Sec. 16.
[69] Code, Sec. 19.
[70] Code, Sec. 32.
[71] Code, Sec. 19.
[72] Code, Sec. 417.
[73] Code, Sec. 17.
[74] By-Laws, No. 6, p. 525.
[75] Code, Secs. 9 (XV), 30.
[76] Code, Sec. 17.
[77] Rules, No. 144, p. 523.
[78] Code, Sec. 11.
[79] Code, Sec. 42.

Assistant Commissioner who acts in his place during his absence.[80]

4. Functions in relation to state educational institutions.
   - *(a) Shall have the control and management of all teacher training institutions in the state maintained wholly or in part by state appropriations, the State Board to approve all plans and policies related thereto. This provision covers both normal schools and summer schools for teachers;[81]
   - *(b) Shall appoint principals and staff of state teacher training institutions;[82]
   - *(c) Shall control and manage courses for teacher training in institutions supported wholly or in part by state funds;[83]
   - *(d) Shall designate or change the names of Normal Schools;[84]
   - (e) Shall prescribe the units of secondary school credit to be accepted for admission to State Normal Schools, prescribe examinations for those entering on teachers' certificates, and determine credits to be allowed transfer students;[85]
   - (f) Shall approve closing of Normal Schools on special days;[86]
   - (g) Shall have supervision of all schools of state receiving state appropriation; this refers to the New Jersey School for the Deaf and the Manual Training and Industrial School for Colored Youth.[87]
5. Functions related to county and local school activities.
   - (a) Instruct county and city superintendents as to their duties and as to the best manner of conducting schools, constructing schoolhouses and furnishing the same;[87]
   - *(b) Appoint county superintendents;[88]

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[80] Code, Sec. 546 (2a).
[81] Code, Sec. 10 (1).
[82] Code, Sec. 10 (2).
[83] Code, Sec. 10 (I).
[84] Code, Sec. 287.
[85] Rules, No. 4 (f, g and h), pp. 494–495.
[86] Rules, No. 9, p. 495.
[87] Code, Sec. 17.
[88] Code, Sec. 33.

*(c) Appoint county attendance officers on certain conditions, and fix salary;[89]

*(d) Appoint county supervisors of child study on certain conditions;[90]

*(e) Appoint county medical inspectors under certain conditions;[91]

*(f) Appoint and fix salaries of helping teachers;[92]

(g) Withhold salary of county superintendent who fails to perform his legal duties;[93]

(h) May approve order of county superintendent ordering local custodian of school moneys to withhold school funds where board or officers fail to perform duties, or to provide suitable school facilities and accommodations;[94]

(i) Shall have supervision of all schools of state sharing in state appropriations (this includes county and local schools);[95]

(j) Shall investigate necessity for introducing vocational education in the units of the state and report monthly to the State Board and subject to its rules shall superintend the establishment and maintenance of such schools, and shall supervise and approve them;[96]

*(k) Shall approve location and rules for management of vocational schools in school districts, and the courses of study and any changes therein in such schools in school districts or counties;[97]

*(l) Shall notify County Vocational Board of withdrawal of state approval of county vocational school;[98]

(m) Shall have control of approval of location, organization, course of study, equipment, and qualifications of teachers in continuation schools established either by county vocational boards or by school districts;[99]

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[89] Code, Secs. 250–252.
[90] Code, Sec. 516.
[91] Code, Sec. 518.
[92] Code, Sec. 20.
[93] Code, Sec. 24.
[94] Code, Secs. 25, 196.
[95] Code, Sec. 17.
[96] Code, Sec. 426.
[97] Code, Secs. 429, 433.
[98] Code, Sec. 448.
[99] Code, Sec. 477.

*(n) Shall prescribe rules and regulations governing qualifications of teachers, organization, management, and control of county vocational schools, for establishment and maintenance of continuation schools;[100]

*(o) Shall prescribe rules for certification of teachers of foreign-born classes;[101]

(p) Shall approve the necessity for supervising principals,[102] and approve the appointment of same in school districts;[103]

(q) Shall notify the district clerk or secretary that the teacher or principal has at the end of the year filed his register and attendance report;[104]

(r) May test the efficiency of pupils in the public schools at such times and in such schools as he sees fit, and shall annually examine all public elementary schools in certain subjects;[105]

(s) May order local board to cancel age and schooling certificate of any child for certain reasons;[106]

*(t) Shall direct county collector to withhold state funds from districts failing to obey the law, etc.;[107] this provision has been upheld by the New Jersey Supreme Court in the following decision:

> Order of Commissioner of Education directing county collector to withhold school moneys from township for failure to provide transportation for two children, respectively aged six and seven years, and residing about two miles from school, held authorized by P. L. 1907, pp. 290, 291 * * * amending title of article 10, and section 126 of P. L. 1903 (2d. Sp. Sess.), p. 48, and requiring school district to provide convenience of access to school.[108]

(u) Shall direct local custodian of school moneys to withhold teacher's salary for neglect of duty;[109]

(v) May notify Article VII boards to permit use of school property for certain purposes;[110]

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[100] Code, Sec. 476.

[101] Code, Sec. 491.

[102] Rules, No. 74 (d), p. 509.

[103] Code, Sec. 131.

[104] Rules, No. 76, p. 510.

[105] Code, Sec. 9 (X) and P. L. 1931, Chap. 306.

[106] Code, Sec. 239.

[107] Code, Sec. 9 (XIV).

[108] Board of Education of West Amwell Township v. State Board of Education, 135 A. 664 (1927).

[109] Code, Sec. 26.

[110] Code, Sec. 127.

(w) Shall see that rules of State Board relative to sanitary requirements and facilities in schools are observed;[111]

(x) May request Commissioner of Charities and Corrections to have standard plans and specifications for school buildings drawn, have copies made, and lend same to school districts;[112]

(y) May request Commissioner of Charities and Corrections to examine a school building and report on its conditions;[112]

(z) May direct entire or partial abandonment of school building and direct making of any changes he thinks proper;[112]

(a′) Shall approve rules and regulations of local board for government of attendance officers;[113]

(b′) Shall approve any change in name of a school district consisting of two or more municipalities;[114]

(c′) May grant permission to local district to expend manual training funds for rental of quarters;[115]

(d′) Serve ex-officio as a member of all boards of examiners for teachers' certificates.[116]

6. Functions related to school finance.

(a) Shall apportion to the counties the appropriations from the State School Fund, the State School Tax, and the Reserve Fund, and furnish abstracts of the same to the State Comptroller, the county superintendents, and the county collectors;[117]

(b) Draw orders on State Comptroller in favor of school districts for apportionment from Emergency Fund, and in favor of county collectors for Reserve Fund and for 90% of State School Tax;[118]

*(c) Apportion funds for manual training courses or schools;[119]

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[111] Rules, No. 132, p. 519.
[112] Code, Sec. 198.
[113] Code, Sec. 246.
[114] Code, Sec. 520.
[115] Rules, No. 97, p. 513.
[116] Code, Sec. 17.
[117] Code, Sec. 27.
[118] Code, Sec. 270.
[119] Code, Sec. 316.

(d) Draw orders on State Comptroller in favor of school districts for apportionment for evening schools for foreign born when course of study has been approved by State Board;[120]

(e) Draw orders for state apportionment for vocational schools;[121]

(f) Draw orders for salaries and expenses of county superintendents;[122]

(g) Certify to county collectors expenses of county medical inspectors;[123]

(h) Draw orders for teachers' library appropriations under certain conditions;[124]

(i) Approve bills for payment of expenses of state summer schools for teachers;[125]

(j) Certify to State Comptroller all expenses of county institutes;[126]

(k) Approve amounts to be apportioned by county superintendents for classes and facilities for physically handicapped children and order such moneys withheld if conditions are not met;[127]

(l) Keep account of moneys received from examinations for Qualifying Academic Certificates and deposit same with State Treasurer;[128]

(m) Remit penalty on district for not maintaining nine months term,[129] or for misuse of state apportionment.[130]

7. Functions related to the program of studies.

*(a) May prescribe minimum "course of study" for elementary and high school;[131]

*(b) Shall prepare course of study in physical training and may employ experts to assist in its preparation;[132] also for course in military training with aid of adjutant general;[133]

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[120] Code, Sec. 222.
[121] Code, Secs. 431, 445.
[122] Code, Secs. 34, 35.
[123] Code, Sec. 519.
[124] Code, Sec. 326.
[125] Code, Sec. 488.
[126] Rules, No. 37, p. 500.
[127] Code, Sec. 276.
[128] Code, Sec. 630.
[129] Code, Sec. 50.
[130] Code, Sec. 334.
[131] Code, Sec. 9 (XI).
[132] Code, Sec. 408.
[133] Code, Sec. 411.

(c) Shall have general supervision and direction of courses in physical training;[134]

(d) Shall prescribe course of study in community civics for intermediate schools and higher elementary grades;[135]

(e) Shall prescribe course of study in Problems in American Democracy for high schools;[136]

*(f) Shall prescribe course of study in geography, history and civics of New Jersey for elementary schools;[137]

(g) Jointly with Commissioner of Banking and Insurance shall prepare course of study in fire prevention;[138]

(h) Shall prepare and publish manuals on accident prevention, and prepare suggested "programs of study" to organize this instruction in connection with allied subjects;[139]

(i) Shall issue circulars of instruction, etc., for Arbor Day;[140]

(j) Shall have approval of uniform "course of study" for county schools prepared by county superintendents;[141]

(k) Shall examine preliminary courses in manual training and approve equipment prior to approval and apportionment by the State Board;[142]

(l) Shall prepare and have printed copies of the fire drill act and have them posted in each school building in the state.[143]

8. Functions related to teachers and teacher training. (See also section 4, p. 38.)

(a) May suspend certificate of teacher for not over one year for unprofessional conduct in breaking contract;[144]

(b) May approve teacher training extension courses when given by approved teacher training schools, or may organize such courses as a part of the program of the Normal Schools or as an activity of the Department of Public Instruction;[145]

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[134] Code, Sec. 415.

[135] Code, Sec. 418.

[136] Code, Sec. 418.

[137] Code, Sec. 419.

[138] Code, Sec. 616.

[139] P. L. 1931, Chap. 50.

[140] Code, Sec. 344.

[141] Rules, No. 68, p. 507.

[142] Rules, No. 88, 105, pp. 512, 514.

[143] Code, Sec. 424.

[144] Code, Secs. 168, 182.

- (c) Shall administer all extension and summer school courses for teachers;[146]
- (d) Shall arrange for county institutes, prepare programs, secure instructors, and hold joint institutes when practicable;[147]
- (e) Shall have approval of courses of pedagogical reading designated by county superintendents.[148]

9. Clerical duties connected with records, reports, and forms. (See also sections 1 and 2, pp. 36–37.)
    - (a) Shall make annual itemized report to State Board of expenses of teachers' institutes;[149]
    - (b) Shall make annual statistical report to State Board of results of medical inspection;[150]
    - (c) Shall receive reports annually from head of each educational institution receiving state aid, and from head of each private school;[151]
    - (d) Shall receive annually report from county superintendents[152] and from city superintendents;[153]
    - (e) Shall receive annually report from county superintendents as to observance of Flag Day and display of flag;[154]
    - (f) Shall receive report annually from each county vocational board;[155]
    - (g) Shall receive report annually from each school board receiving state appropriation for manual training;[156]
    - (h) Shall receive report annually from each school board on evening schools for foreign born;[157]
    - (i) Shall receive annually from local boards lists of physically handicapped children;[158]

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[145] Rules, Nos. 31, 34, p. 499.
[146] Rules, No. 35, p. 499.
[147] Rules, No. 36, p. 500.
[148] Rules, No. 69, p. 507.
[149] Code, Sec. 340.
[150] Rules, No. 116, p. 516.
[151] Code, Sec. 28.
[152] Code, Sec. 36.
[153] Code, Sec. 87.
[154] Rules, No. 71, p. 507.
[155] Code, Secs. 438 (X), 467 (X).
[156] Code, Sec. 320.
[157] Code, Sec. 224.
[158] Code, Sec. 194.

(j) Shall receive canceled age and schooling certificates from local board;[159]

(k) Shall receive from Article VII boards and file copies of official papers in school bonding proceedings; canceled bonds; and from district clerk annually report concerning outstanding bonds;[160]

(l) Shall have printed and distributed:
  (1) forms for reports and proceedings;[161]
  (2) the state school laws;[161]
  (3) forms for teachers' contracts;[162]
  (4) forms for annual reports of school districts and county superintendents;[163]
  (5) diplomas for pupils to be awarded by county superintendents;[164]
  (6) forms for reports to Commissioner of attendance lost by pupils on account of contagious disease.[165]

10. Functions related to pupils.

*(a) Shall prescribe method of ascertaining what children are 3 years or more below normal;[166]

(b) Shall recommend or approve facilities for special classes for physically handicapped children;[167]

(c) Shall upon application designate blind persons as fit persons to receive state aid toward higher education, and if necessary to order such aid withheld;[168]

(d) Shall grant or revoke age and schooling certificates to pupils studying part-time in vocational schools.[169]

11. Miscellaneous functions.

(a) Shall hold meetings of city and county superintendents at least once each year;[170]

(b) Shall issue Qualifying Academic Certificates of preliminary academic education, prescribe rules and regulations to carry into effect the law concerning such certificates;[171]

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[159] Code, Sec. 241.
[160] Code, Secs. 154, 156, 157.
[161] Code, Sec. 29.
[162] Code, Sec. 165.
[163] Code, Sec. 273.
[164] Rules, No. 70, p. 507.
[165] Rules, No. 81, p. 511.
[166] Code, Sec. 9 (XII).
[167] Code, Sec. 194.
[168] Code, Secs. 606, 607, 610.
[169] Code, Sec. 636.
[170] Code, Sec. 9 (XIII).
[171] Code, Secs. 628, 631.

(c) Shall issue certificates of qualification for professional study to disabled soldiers completing Federal Vocational courses.[172]

B. Judicial Functions of the Commissioner

The Commissioner of Education, in his judicial capacity, is required to

> * * * decide, subject to appeal to the State Board of Education and without cost to the parties, all controversies and disputes that shall arise under the school laws, or under the rules and regulations of the State Board of Education.[171]

It is required that the facts involved in the controversy shall, if the Commissioner sees fit, be submitted by the parties concerned in sworn statements, accompanied by certified copies of all documents necessary to a full understanding of the issues involved. His decision is binding until after appeal a decision is made by the State Board.[173]

As supplementary to this duty, the law gives to the Commissioner and to the Assistant Commissioners the power and duty to administer oaths and take affidavits without charge concerning any matter relating to the schools.[174]

IV. FUNCTIONING OF THE JUDICIAL POWERS OF THE COMMISSIONER AND THE STATE BOARD

As was previously stated, the Commissioner hears appeals upon disputes arising under the school law.[175] As a matter of fact, the cases are heard by the Assistant Commissioner in charge of legal affairs,[176] his decisions being subject to the approval of the Commissioner.

A. Rules Concerning Hearings and Appeals

For a time is was the custom of the Commissioner, in case of an appeal from a decision by a school district board which followed a hearing before such board, to require a stenographic or written record of the testimony and proceedings. The State Board however disagreed and held that such were not required:

> In the absence of any statute requiring or providing for a stenographic or other record of the testimony and proceedings * * * we cannot agree

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[172] Code, Sec. 634.
[173] Code, Sec. 18.
[174] Code, Sec. 31.
[175] Code, Sec. 18.
[176] Code, Sec. 9 (VI).

> with the holding. It seems to us that to require stenographer's minutes, no matter how desirable they may be, is to assume a power which can be exercised only by the legislature.[177]

If any action is brought to contest the validity of an election ordering the issue of bonds it must be instituted within twenty days from the date of the election.[178] In no other case is a definite time limit set within which appeals must be brought before the Commissioner. When an appeal is taken from any decision of the Commissioner to the State Board, however, it must be made within thirty days after the Commissioner has filed his decision.[179]

When a hearing is held by the Commissioner or the State Board, it is customary for both parties to the dispute to be represented by counsel. As is evidenced by an examination of the reports of these cases, the parties may decide in case of a hearing before the Commissioner, to present an agreed statement of facts and receive his decision subsequent to argument by counsel, and without examination of witnesses. In case of an appeal from the decision of a local board made after a hearing by that body, the parties may in most cases agree to submit a transcript of testimony and proceedings as a basis for the hearing by the Commissioner. When the issue involved, however, is the removal by a local board of one of its officers, the Supreme Court has held:

> Under School Law, § 10, hearing by commissioner of education of rightfulness of removal by local board of officer, under school law is *de novo*, and not limited to mere review of evidence taken before local board.[180]

When an appeal is taken from a decision of the Commissioner to the State Board, it must be heard on the record on which he rendered his decision, which record he must certify to the State Board.[181]

The procedure established by the rules of the State Board requires that when an appeal is taken to that body the following steps must be observed:

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[177] Follmer v. Board of Education of Jersey City, State School Report, 1928, p. 78, decision of St. Bd., Oct. 6, 1928, reversing decision of Com. of Ed., Mar. 20, 1928.

[178] Code, Sec. 151.

[179] Rules, No. 134, p. 520.

[180] Schwarzrock v. Board, 90 N. J. L. 370, 101 A. 394.

[181] Rules, No. 133, p. 520.

1. The party appealing must file a notice with the Commissioner and serve notice upon the adverse party or his attorney by registered mail or personally, stating that an appeal is taken to the State Board from the decision or from any part of it. An affidavit stating the time and manner of service of the notice must be filed with the Commissioner.
2. Within five days after the appeal is taken, the appellant must file with the Secretary of the State Board and serve upon the respondent a statement of the points upon which he relies, and a reference to evidence and authorities in support thereof. He must at the same time file with the Secretary of the State Board a request for an oral hearing if he desires such.
3. The respondent has five days within which to file and serve upon appellant any answering points, and a request for oral hearing.
4. The appellant has then two days in which to file and serve answering points.
5. On the fifteenth day after an appeal has been taken, the Secretary of the State Board remits all official papers to the Law Committee of the State Board.
6. The Law Committee determines whether an oral hearing should be held, and if so, notifies the parties involved of the time and place, which is on one of the meeting days of the State Board.
7. The Law Committee hears the appeal and recommends its conclusions to the State Board, which body makes the formal decision.[182]

B. The Exclusive Nature of the Jurisdiction of the Commissioner and the State Board in Appeals under the School Law

The following decisions of the courts and of the school tribunals are quoted to illustrate rather fully the exclusiveness of the jurisdiction of the Commissioner and the State Board:

1. Special tribunals created by the Statute have exclusive jurisdiction over all controversies arising under such statute, and an action at law can-

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[182] Rules, 134–140, pp. 520, 521.

not be maintained by a public school teacher for the purpose of contesting the legality of the action of a local school board in dismissing him before the term of service provided in his contract of employment has expired.[183]

2. The court will not review by *certiorari* the action of a local board of education under the School Law until redress has first been sought in the special tribunals provided by the act.[184]

3. The law is settled that the prerogative writs of the state should not be awarded until the remedies provided by the school law have been exhausted.[185]

In at least two instances, however, the Supreme Court has permitted the issuance of its prerogative writs in cases under school law, without requiring the usual preliminary appeals to school tribunals. The first of these has arisen when the title to an office under the school law is in question. In two such cases in earlier years the Supreme Court had ruled that the prerogative writs would not be allowed until the remedy under the school law had been exhausted.[186] In a later case the writ of *quo warranto* issued, but the report failed to show whether the right of appeal to the State Board had been exhausted.[187] In a case decided in 1910, the court ruled that the law requiring appeals through the school tribunals

> * * * is not unconstitutional as preventing a resort to *quo warranto* to test the right to office of a member of a township board of education, since it does not prevent resort to that remedy but only postpones it until after appeal is made to the State Board.[188]

A more recent decision which overlaps that of Burlew v. Bowne and probably establishes a guiding principle for action in cases involving title to office of school director, was handed down by the Supreme Court May 31, 1913. This decision in part was:

> There is a reason why the court should permit the issue of a *quo warranto* without waiting for the determination of the double appeal to the

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[183] Draper v. Commissioners of Public Instruction, 66 N. J. L. (37 Vr.) 54.

[184] Board of Education of Flemington v. State Board of Education, 71 N. J. L. (52 Vr.) 211.

[185] Ridgway v. Board, 88 N. J. L. 530, 96 A. 390, 391.

[186] Jefferson v. Board of Education, 64 N. J. L. (35 Vr.) 59, 45 A. 775; Stockton v. Board of Education, 72 N. J. L. 80, 59 A. 1061.

[187] Sheridan v. Lankering, 83 A. 641.

[188] Burlew v. Bowne, 87 A. 702.

> Commissioner of Education and to the State Board. The action of the Commissioner and the Board cannot be either final or effective. It cannot be final, since neither the relator nor the defendant can be deprived of the right to submit the question to a jury if the pleadings are so framed as to present an issue of fact. It cannot be effective since the State Board cannot oust the incumbent of a public office. They pass on the question only for immediate purposes. * * * I think it clear that, where so important a question as the title of members of a school board to their office is involved, a proper exercise of discretion permits, if it does not require, the speedy adoption of the only final and effective procedure to determine the question.[189]

The second exception to the general rule of appeals appeared in a case involving the exclusion of a child from a public school because of his color. In this case the court allowed a writ of mandamus without first requiring the usual appeals, since the constitutional rights of the appellant were involved:

> Where a child of school age is excluded from the public schools solely on the ground of color, and it is not a question of the particular school to which he is assigned as a mere matter of convenience, it is not necessary to assert his rights in the first instance through the procedure provided by the school law, but resort may be had at once to mandamus.[190]

The question has arisen as to the extent to which the official opinions of the Attorney-General upon the school law are binding upon the Commissioner of Education and the State Board. In a 1924 case, the State Board ruled that:

> No official, person or body of persons is empowered to pass on [a case arising under the school law] except the Commissioner, and on appeal, this Board. Therefore * * * no ruling of any other official or board could be binding upon the Commissioner or is now binding upon us. The opinion of the Attorney-General was and is, of course, entitled to great respect as an opinion, but it was not a ruling or other act which the Commissioner or this Board must follow in deciding this case.[191]

C. The Conclusive Nature of the Decisions of the Commissioner and the State Board

When either the Commissioner or the State Board has made a decision, it is entitled to the same respect as if made by a court of law or equity:

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[189] Koven v. Stanley, 87 A. 89.

[190] Raison v. Board of Education, 103 N. J. L. 547.

[191] Albertson v. Board of Education of Borough of Glassboro, State School Report, 1924, p. 261, decision of St. Bd., reversing decision of Com. of Ed., Apr. 11, 1924.

1. The State Superintendent having been given authority to hear and determine certain matters, his determination thereupon has the conclusive quality of a judgment pronounced in a legally created court of limited jurisdiction acting within the bounds of its authority.[192]

2. There is no distinction in point of conclusiveness between the decisions of special tribunals and the judgments of courts of record. The difference is solely in the presumption of jurisdiction.[192]

3. Assuming the state board on appeal had refused relief to relators, its decision would be binding on the local board until set aside by a direct attack on *certiorari*.[193]

D. Examples of Points or Issues Subject to the Jurisdiction of the Commissioner and the State Board

The following points do not by any means represent a list of all points subject to the jurisdiction of the Commissioner and the State Board. They represent only issues on which the authority of the school tribunals to make decisions has been challenged.

1. The election or appointment of school board members:

> The State Superintendent of Public Instruction is authorized by law to decide disputes and controversies as to the election of members of the Board of Education of certain municipalities.[194]

2. A controversy concerning removal by school authorities of officers or employees:

> I agree with the State Board that the controversy [concerning dismissal of supervisor of buildings] was one of which the Commissioner of Education and the State Board had jurisdiction under section 10 of the School Law.[195]

3. A controversy involving assignment of children to school.

> In a case of a controvery between a citizen and the local board of education respecting the public school to which the children of the

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[192] Thompson v. Board of Education, 57 N. J. L. (28 Vr.) 628.

[193] Ridgway v. Board. See footnote [185] *supra.*

[194] DuFour v. State Superintendent, 72 N. J. L. (43 Vr.) 371, 61 A. 258. See also: Van Buren v. Albertson, 54 N. J. L. (25 Vr.) 72; Bourne v. Board of Education of Atlantic City, State School Report, 1912, p. 114, decision of Com. of Ed., Aug. 20, 1912, affirmed by St. Bd., Jan. 4, 1913; Lasher et al. v. Board of Education of Township of Weehawken, S. L. D., p. 18, decision of Com. of Ed., Jan. 29, 1914, affirmed by St. Bd., May 2, 1914.

[195] Schwarzrock v. Board. See footnote [180] *supra.* See also: Thorpe v. Board of Education of City of Bayonne, State School Report, 1928, p. 94, decision of Com. of Ed., June 7, 1928, affirmed by St. Bd., Nov. 3, 1928; Draper v. Commissioners of Public Instruction. See footnote [183] *supra.*

citizen should be assigned all remedies provided by the school law of 1903 must be exhausted by the citizen before the prerogative writs of the state are awarded to him.[196]

4. A controversy concerning responsibility of governing body of municipality to provide funds properly appropriated.

When the body having power to make appropriations of money raised by tax fails to provide for the amount fixed and determined by the board of school estimate as necessary for the erection of a school building, a controversy has arisen under the school laws, and the remedies by appeal to the state superintendent of public instruction and the state board of education must be exhausted before recourse is had to the courts.[197]

5. Refusal of a board of education to call a special meeting of voters on proper petition.

Refusal of a board of education to call a special meeting on request by petition under the School Act * * * involves a controversy under the school laws within section 10, cognizable in the first instance by the state superintendent of public instruction, and on appeal by the state board of education.[198]

E. Limitations upon the Jurisdiction of the Commissioner and the State Board

1. The Commissioner and the State Board cannot rule upon the constitutionality of a law:

The Commissioner must decide a controversy under a law as it stands upon the assumption that such law is constitutional until declared otherwise by a court of competent jurisdiction.[199]

2. In disputes between a board of education and the governing body of a municipality:

No jurisdiction can be assumed by the Commissioner over a dispute between a board of education and the governing body of a municipality except upon the application of one or the other of such corporate bodies. [The Commissioner has no jurisdiction] to try matters of dispute arising between the board of education of a school district and the governing body of a municipality on a petition filed by an individual.[200]

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[196] Stockton v. Board of Education, 72 N. J. L. (43 Vr.) 80, 59 A. 1061.

[197] Town Council of Montclair v. Baxter, 76 N. J. L. 68, 68 A. 794.

[198] Ridgway v. Board. See footnote 185 *supra.*

[199] Coriell et al. v. Board of Education of Township of Passaic, State School Report, 1925, p. 258, decision of Com. of Ed., Jan. 26, 1925.

3. Neither the Commissioner nor the State Board can take action removing or punishing members of school boards or other school officers.

> (a) The State Board of Education cannot oust an incumbent from a public office such as membership in a school board;[201]
>
> (b) In cases such as that under consideration * * * where it is alleged that public school funds have actually been illegally expended to compensate board members for services rendered, it is the Commissioner's opinion that the Criminal Courts rather than a special school tribunal must be resorted to for an adequate remedy. Neither in the Commissioner's opinion has he any power under the School law to consider any petition for the abolition or removal of a board of education or for the punishment of individual board members for "misconduct, irregularities, misfeasance or malfeasance in office." Again the proper remedy would appear to be with the Criminal Courts or a Court of Impeachment.[202]

4. Neither the Commissioner nor the State Board is competent to determine the guilt or innocence of crime of a school officer:

> The proceeding could only result in either affirming or reversing the removal. It could not result in any binding judgment as to his guilt or innocence of the charge of attemped bribery; the finding that he was guilty or innocent could only be a finding for the purpose of action by the board, not for the purposes of the criminal law.[203]

5. The Commissioner and the State Board do not, as a matter of policy, interfere, and probably cannot legally interfere, with judgments of local boards acting without prejudice upon matters in which they are given discretionary power:

> (a) When municipal corporations are acting within the power and discretion vested in them by the legislature, in the absence of fraud the courts cannot interfere unless it appear that the power or discretion is being manifestly abused to the injury or oppression of the citizen.[204]

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[200] In the matter of the application of Margaret T. Hatfield v. City Council of City of Elizabeth, State School Report, 1921, p. 308, decision of Com. of Ed., Nov. 16, 1920.

[201] Koven v. Stanley. See footnote 189 *supra.*

[202] Furrer v. Board of Education of Borough of Beachwood (In *MSS.*), decision of Com. of Ed., July 17, 1929.

[203] Schwarzrock v. Board. See footnote 180 *supra.*

[204] Carling v. Jersey City, 71 N. J. L. (42 Vr.) 154, 58 A. 395.

> (b) This Board will not disturb the finding of a local board on a question of this kind [the dismissal of a teacher], provided it has reached its decision after giving a fair hearing and there is no showing of passion or prejudice on its part.[205]

6. In a matter involving payments claimed to be due under a contract with a school board the Commissioner and the State Board have no power to make an award:

> The matter is one of contractual relationship between the Board of Education and the architect. If he deems any sum of money due to him by reason of the preparation of the plans and specifications for the schoolhouse in question, his remedy is by an action at law. Certainly, he cannot enforce such action by an appeal to the Commissioner of Education under the School Law, and even if the Commissioner of Education should decide that the local board of education was indebted to Ceccarelli, there is no machinery provided by the School Law for the enforcement of such a claim.[206]

V. APPEALS FROM THE DECISIONS OF THE STATE BOARD OF EDUCATION

Appeals from the decisions of the State Board are carried in the same manner as from those of the other subordinate tribunals to the Supreme Court. In case a litigant desires to contest a decision of the State Board, the appeal to the Supreme Court is by certiorari. One who desires to secure the authority of that court to carry out a judgment returned in his favor, either by the lower tribunals or by the Supreme Court, seeks a writ of mandamus. When test is being made of the title to office of one who holds that office, a writ of *quo warranto* must be prosecuted by the Attorney-General.

For certain reasons, especially any error claimed on the part of the Supreme Court, an appeal may be taken from that court by its permission to the Court of Errors and Appeals. This body is the court of last resort in New Jersey, beyond which the only appeal is to the Supreme Court of the United States, on proper legal and constitutional grounds.

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[205] Cheesman v. Board of Education of Gloucester City, S. L. D., p. 156, decision of St. Bd., reversing decision of Com. of Ed., Oct. 28, 1921. Decision affirmed by Supreme Court. Similar decision concerning dismissal of janitor in Eggers v. Board of Education of City of Elizabeth, State School Report, 1927, p. 50, decision of St. Bd., Feb. 5, 1927, reversing decision of Com. of Ed., Oct. 28, 1926.

[206] Opinion of Attorney-General Edmund Wilson, May 13, 1913. In Minutes of State Board of Education, June 1, 1913.

VI. SUMMARY

A survey of the administrative set-up for the control of the State's interest in education in New Jersey reveals the existence of five bodies which share, to varying degrees, this responsibility. These are the State Board of Education, which is perhaps the most important; the State Board of Examiners, whose functions are of much less importance than in former years, due to the discontinuing of the examinations for teachers and a changed policy concerning teacher training; the Board of Visitors, which performs certain minor duties in connection with the State University; the Trustees for the Support of Public Schools; and the newly created State Board of Regents, which is charged with the care of the State's interest in higher education.

Since 1911, the school laws have made the Commissioner of Education to an increasing degree the executive head of the state school system, and have clothed him with wide powers. Generally speaking, the Commissioner of Education initiates policies, the State Board approves them, the Commissioner executes them, and the State Board appraises the results. There are numerous exceptions to this administrative practice, however, since the Commissioner exercises in some instances functions of approval or appraisal, and the State Board in certain cases is given executive functions.

On the judicial side, the policy of committing to school tribunals the responsibility for interpreting the school law has tended to bring to the litigants in such cases a combination of legal expertness and administrative intelligence. The result of this policy, therefore, has been a body of decisions which follow closely recognized principles of law, and at the same time show a clear understanding and sympathy with conditions underlying local and state administration of schools.

CHAPTER IV

THE RELATIONSHIP OF THE STATE TO HIGHER EDUCATION AND TO SPECIAL FORMS OF EDUCATION

I. Introduction

The reason for the interest of the state in higher and certain special forms of education is not the same as for elementary and secondary education. In the two latter forms, the interest of the state is based upon the need for general education as a means of self-protection of the state. A generally high level of trained intelligence for the masses is essential for the preservation of democracy. In the case of higher education, the purpose of the state in supporting any program is to provide for certain types of training on the part of a certain portion of the population, which the state deems are necessary for its welfare, and which privately endowed colleges cannot or at least do not adequately supply. Special types of education, as distinguished from higher education, are provided for by the state in order to ensure for certain groups in society a means of training essential to make them self-supporting as members of society, when such training is not provided by private organizations or by the local public schools.

As examples of higher education this chapter will discuss the State University, the state teacher training facilities, and the state's relationships with higher institutions not subsidized by the state. Special types of education which will be discussed are those provided in the New Jersey School for the Deaf and in the Manual Training and Industrial School for Colored Youth.

II. The State University of New Jersey

A. *Historical Sketch*

After the passage of the first Morrill Act of 1862 by the United States Congress, the New Jersey legislature by the Act of 1864 designated Rutgers College as the State College for the benefit of Agriculture and Mechanic Arts. By this law, the condition was laid down that the trustees should devote the interest on the scrip for public lands granted to the state wholly and exclusively to the purpose designated by the act of Congress, and in that department of Rutgers College known as Rutgers Scientific School. In order that the state might have a supervisory control over the funds so devoted, the act provided for a board of visitors to be appointed by the governor, with the advice and consent of the senate, whose duty it should be to visit the school at least twice annually and to report their findings to the legislature. The board of visitors was given general powers of supervision and control, and was required to submit to the legislature such recommendations as it thought best.[1] In 1880 the state established at the same institution the New Jersey Agricultural Experiment Station, and the board of visitors was named as its board of managers. In 1888 the state accepted the provisions of the Federal Hatch Act and established the Agricultural College Experiment station to receive the Federal funds appropriated. In 1891 the state accepted the provision of the second Morrill Act by which Federal appropriations were made to the states for land grant colleges, and the state ordered such payments made to the Treasurer of Rutgers College. In 1902 the Department of Ceramics was established under state control; in 1908, the College of Engineering; and in 1910, the Department of Chemistry. In 1917 those portions of the institution which were supported by the state were designated "The State University of New Jersey." In 1918 the Trustees of Rutgers College established the New Jersey College for Women as a part of the State University and requested state appropriation therefor. In 1920, the New Jersey Ceramic Research Station was established and in 1927 the New Jersey College of Pharmacy, which is associated with the State University but receives no state aid. The University Extension Division, the Department of Military Science and the Psychological and Mental Hygiene Clinic established by the Trustees might also be considered, in the opinion of the Secretary of the State Board of Regents, as part of the State University since they are partly supported by state moneys.[2] In 1930 the legislature authorized the Board of Regents to establish a department of real estate education, and for the year 1931–32 the Board contracted with the Trustees of Rutgers College to provide such instruction.[3]

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[1] Bartlett, L. W.: *State Control of Private Incorporated Institutions of Higher Education,* Teachers College, Columbia University, Contributions to Education, No. 207. Bureau of Publications, Teachers College, Columbia University, New York City, 1926, pp. 25–29.

The state funds appropriated from time to time for building purposes for the State University have not been expended in any case for land. Some of the buildings are erected on land given to the state by the trustees of Rutgers College, and others on land owned by the Trustees.[4]

B. The Constitutionality of the New Jersey Program for Higher Education

The question of the right of the state to appropriate funds under the arrangement existing with Rutgers University first arose in connection with the state scholarships which had been awarded to New Jersey students almost from the beginning of the State Agricultural College. When in 1890 the legislature provided for additional scholarships and ordered them paid out of the income of the State School Fund, the State Comptroller refused to pay the appropriations on the ground that the act was unconstitutional. The objections raised were: first, that the constitution forbade paying out any part of the interest on the school fund except for the support of free public schools; and second, that the appropriation was, in effect, giving money to a society, association, or corporation in contravention to the constitution. The state, therefore, accumulated a debt to the college which, in 1903, the legislature attempted to pay in part by an appropriation out of the state treasury. The State Comptroller again refused to pay the amount appropriated upon the same grounds. After a friendly suit, both the New Jersey Supreme Court (1904) and the New Jersey Court of Errors and Appeals

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[2] Letter, Charles H. Jung, Secretary, New Jersey State Board of Regents, Dec. 22, 1931.

[3] P. L. 1930, Chap. 173. Information concerning contract in letter of Charles H. Jung. See footnote 2 *supra.*

[4] Report of George F. Zook and L. E. Blanch on ''Higher Education in New Jersey,'' a chapter of the unpublished report of the experts of the New Jersey Public School Survey Commission, 1928–29.

(1905)[5] found the appropriation constitutional. The decision in this case was of such significance to state participation in the educational program above the secondary level, that a number of quotations are given.

1. Ability of the state to provide for the education of children below the age of 5 years and above the age of 18 years.

> The provision in the constitution that free public schools shall be established for all children between the ages of 5 and 18 years does not exclude the legislative power to provide for the education of persons not within that class.[6]

2. The constitutional provision protecting the State School Fund is not a limitation of legislative power over the subject of free public education.

> Article 4, section 7, paragraph 6 of the state constitution prohibits the legislature from appropriating any part of the school fund to any free public school to which all the children of the state between the ages of five and eighteen years are not admitted. It cannot be applied to any other purpose whatever by which it might be diminished to such an extent that such free public schools might at any time be without sufficient support.
>
> This provision of the constitution is not a limitation of legislative power over the subject of free public education. It prescribed what must be done with the school fund, not what may be done at the public expense out of the general funds of the state. The facilities of free public education are to be provided by the legislature within the exercise of a sound discretion subject only to constitutional restraints which must be found in expression or clear implication.[7]

3. The constitutional provision prohibiting donations to private agencies by the state does not control legislative policies for a system under state control.

> The provisions of the constitution prohibiting donation of land or appropriations of money by the state for the use of any society, association, or corporation, were intended to prohibit donation to private or sectarian schools, and not to narrow the legislative powers to furnish facilities by general laws for a public education under its own supervision.[8]

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[5] *Ibid.*

[6] Trustees of Rutgers College v. Morgan, 70 N. J. L. (41 Vr.) 460, 57 A. 250.

[7] *Ibid.*

[8] *Ibid.*

4. The acts which provided for the development of a State University at Rutgers are not unconstitutional as providing for donations to private agencies.

   Act, March 21, 1863 (P. L., p. 441), providing for the establishment of an agricultural college at Rutgers, and its support out of the general fund, and subsequent legislation on that subject, is not a violation of the provision that no donation of land or appropriation of money shall be made by the state for the use of any society, association or corporation.[8]

C. Control of the State's Provision for Higher Education, Exclusive of Normal Schools and Teachers' Colleges

1. General Features

The general features of the control of the state provision for higher education in New Jersey are indicated in the following:

> The situation with regard to a State University in New Jersey is somewhat anomalous in that this name is applied to a department of Rutgers College. Not by charter, but by resolution of the Board of Trustees of Rutgers College, the term ''Rutgers University'' has been applied to all the activities and units at New Brunswick, one of which has the additional title of ''State University of New Jersey.''
>
> The entire institution is under the direct management and control of the Trustees of Rutgers College in New Jersey (a private corporation and by charter a self-perpetuating body) who are subject to the supervision and control of the Board of Visitors representing the state in all matters pertaining to the units of the State University of New Jersey.[9]

There are two exceptions to this scheme of control. One is found in the Agricultural College Experiment Station, which is under the exclusive control of the State Board of Visitors. The other exists in respect to the courses in Rutgers University maintained by the state for the training of teachers under the Federal Smith-Hughes Law. By arrangement with the State Board of Education, Rutgers College and the New Jersey College for Women provide such courses in five fields—Agriculture, Trades and Industries, Continuation Schools, Home Economics, and Industrial Arts. The instructors are employed and paid by the Department of Public Instruction, and are merely loaned to the two colleges. All of the training is under the immediate direction of that State Department. Prior to 1929, moreover, a large number of state scholarships to the State University were at the disposal of the Commissioner of Education for New Jersey students and were awarded upon a competitive basis.

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[9] Letter, Charles H. Jung, Secretary, New Jersey State Board of Regents, Dec. 22, 1931.

That a need for closer relationships between the state and the entire institution at Rutgers was felt, was made plain in 1927, when the charter of Rutgers College was amended in order to give the state a larger representation upon the Board of Trustees. This was accomplished by adding to that body as ex-officio members the Chancellor of the State, the President of the Senate, the President of the State Board of Education, and the Commissioner of Education. This board already had the Governor, the Chief Justice and the Attorney-General as ex-officio members.[10]

In 1929, two important changes in the state plan for higher education were made. The first of these was the abolishing of the state scholarships to Rutgers.[11] The second was the establishing of the State Board of Regents.[12]

2. The State Board of Regents

Due partly to revelations of the Survey Commission of 1928–29 concerning provisions for higher education in the state, and partly to the report of a Legislative Commission in 1929 on Rutgers and the State University,[13] it was evidently felt that the problem needed more constant study and more careful planning and supervision. Hence, a new law which was very general in its provisions created the State Board of Regents. This body consists of eight members, the Commissioner of Education being an ex-officio member, and the others being appointed by the Governor with the advice and consent of the Senate. These seven members must be residents of the State and must not be officially connected with any institution of higher learning receiving state aid.

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[10] New Jersey Public School Survey, unpublished report of experts. See footnote [4] *supra.*

[11] P. L. 1929, Chap. 107.

[12] P. L. 1929, Chap. 76.

[13] Report of the Commission on Rutgers and the State University to the Legislature of the State of New Jersey, February 11, 1929. MacCrellish & Quigley Co., Printers, Trenton, New Jersey, 1929.

The functions of the Board as given in the law and as interpreted in the first annual report of the Board of Regents, are as follows:

1. To determine the needs of the state in respect to public higher education;
2. To determine to what extent institutions of higher education, other than state institutions, shall be utilized by the state, in whole or in part, in meeting its needs in respect of public higher education;
3. To consider future as well as present needs for development of such institutions as may be selected for the use of the state in furthering public higher education;
4. To determine the cost of any program of public higher education that it may develop;
5. To avoid and remove all duplication of services provided with those performed by any state institution;
6. To contract, on behalf of the state, with institutions which the board may select both for current services of public higher education and for the support of such institutions to the extent necessary to supply the state's future needs for public higher education, subject to the approval of the legislature of all appropriations under such contracts;
7. To satisfy itself that all funds so appropriated are applied to the purposes for which intended, and to confer with the administrative officers of such institutions as it may select to provide public higher education;
8. To have the sole responsibility for recommending appropriations for public higher education; and
9. To have the care, custody and control of such property as the state now has devoted to the purpose of public higher education, or which it may hereafter acquire.[14]

It is to be noted that this legislation does not expressly abolish the Board of Visitors of the State University, nor does it provide for the taking over of the functions of that body except so far as they may be related to the control of the property of the state which is devoted to higher education. Nor does it seem to subtract from the power exercised by the State Board over training for teachers of vocational subjects under the Smith-Hughes Law. There is an evident need for a further definition of functions of each of the bodies concerned, in order to prevent both duplication of service and conflict of authority.

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[14] P. L. 1929, Chap. 76. Summary of provisions contained in First Annual Report of the New Jersey State Board of Regents to the Legislature of the State of New Jersey, March 1, 1930.

III. THE SCHOOLS FOR INDUSTRIAL EDUCATION AT NEWARK

The Trustees of Schools for Industrial Education at Newark have under their control the Newark Technical School, and the associated College of Engineering. For many years these schools have received from the state, under special legislation, the sum of $30,000 per annum.[15] Under the power given by law, the State Board of Regents entered into contractual relations with the Trustees of this institution for the purpose of providing the type of technical education of college level which it was felt by the Board of Regents was demanded by the needs of students of the state.[16]

IV. STATE RELATIONS TO ALL INSTITUTIONS OF HIGHER EDUCATION

The state has at least three means by which it is enabled to control to some extent the administration and the curricula of institutions for higher education in New Jersey. These are its possession of the charter-giving privilege, its control over the privilege of granting degrees, and its control over the conditions for admission to the pursuit of many of the important professions through the Qualifying Academic Certificate, or other forms of certification or registration.

A. Incorporation of Higher Institutions of Learning

The New Jersey laws provide that ''any existing private school'' may become a ''corporation for the promotion of learning,'' upon executing, recording and filing a certificate by the incorporators in the office of the clerk of the county. Thereupon, the corporation is vested with the usual corporate powers, such as perpetual succession, the right to sue and be sued, to have a common seal, to appoint officers and subordinates, to make bylaws, to enter into contracts, to hold property, to borrow money by issuing bonds, and to exercise any corporate powers necessary to the exercise of the specific powers named. Such an association is to be controlled by a board of trustees of not less than five nor more than fifteen members, and shall not have any capital stock nor be incorporated for profit.[17] Concerning this provision of the law, Assistant Commissioner of Education C. J. Strahan says, "We think that 'school' as used would also include colleges."[18]

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[15] First Annual Report, New Jersey State Board of Regents, March 1, 1930, p. 7.

[16] Letter, Charles H. Jung, Secretary, State Board of Regents, Dec. 22, 1931.

Under an 1879 statute, provision is also made for incorporation of institutions for higher education by members of a religious society or denomination, and the recording of the certificate of incorporation in the office of the county clerk of the county in which the institution is located. This certificate is filed permanently in the office of the Secretary of State.[19]

A still further regulation which applies only to medical schools and colleges located in New Jersey, is that they must be licensed by the State Board of Medical Examiners.[20]

B. State Control of Granting of Degrees and Diplomas

Every educational institution offering courses of instruction leading to degrees or diplomas of graduation or of proficiency "in the arts, sciences or professions," is required to file with the State Board of Education a copy of its certificate of incorporation, and obtain from that board a license to carry on such business under such rules and regulations as the State Board may prescribe. No degrees may be granted by such an institution until its courses of instruction have been approved by the State Board, except that this provision does not extend to any institution established before 1891, nor to any part of the public school system of the state. The State Board of Education is given the power, after notice and hearing, to revoke any such license for conferring degrees, upon sufficient cause being shown. A severe penalty is provided for any institution or officers which violate the provisions of the act by granting degrees or diplomas without the requisite license to do so.[21]

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[17] Code, Sec. 627.

[18] Letter, Jan. 12, 1932, Assistant Commissioner of Education C. J. Strahan.

[19] P. L. 1879, p. 265.

[20] Cum. Sup., p. 1881.

Under the powers granted by this provision, the State Board of Education has adopted rules and regulations governing the licensing of law schools and the conferring of the degree of LL.B. These rules cover such points as incorporation of institution, faculty, equipment and resources, classroom and library facilities, rules for admission, length of course, length of school year, residence requirement, and character and age of candidate for graduation.[22]

C. Certificates and Examinations for Admission to Professions

1. Qualifying Academic Certificates.

   The Commissioner of Education is entrusted with the power to issue ''qualifying academic certificates'' which certify that the holder has had the preliminary academic education required by the rules of the Supreme Court or by law for admission to an examination for license to practice law, medicine, dentistry, chiropody, pharmacy, or for license as a certified public accountant or other profession or vocation for which such certificate is required by law. The Commissioner is empowered to prescribe such rules and regulations as are necessary to carry the law into effect.[23]

2. Professional examinations and licensure.

   The New Jersey law provides for examination and licensing of practitioners in the fields indicated by the several bodies named, in all of which specific educational, as well as other prerequisites, are laid down:

   (a) Physicians and surgeons, chiropractors, osteopaths, chiropodists, and midwives—State Board of Medical Examiners;[24]

   (b) Dentists—State Board of Registration and Examination in Dentistry;[25]

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[21] Code, Secs. 619–626.

[22] Rules, No. 143, pp. 522–523.

[23] Code, Secs. 628–631.

[24] Cum. Sup., pp. 1867–1897; also P. L. 1925, Chap. 126.

[25] P. L. 1915, Chap. 146.

(c) Graduate nurses — State Board of Examiners of Nurses;[26]

(d) Architects—State Board of Architects;[27]

(e) Professional engineers and surveyors—State Board of Professional Engineers and Land Surveyors;[28]

(f) Optometrists—State Board of Optometrists;[29]

(g) Pharmacists—State Board of Pharmacy;[30]

(h) Veterinary physicians and surgeons—State Board of Veterinary Medical Examiners;[31]

(i) Public accountants—State Board of Public Accountants.[32]

3. Teachers' Certificates.

Certificates for teachers in public schools are issued by the State Board of Examiners under rules and regulations prescribed by that body and approved by the State Board of Education. These provisions are more completely described in the chapter entitled "The Legal Status of Teachers, Supervisors, and Principals."[33]

It is evident that the setting up of standards for degrees, certificates and licenses is a very important part of the control which the state exercises over higher education. The institutions of higher learning must adjust their entire program of studies, their curricula, and the content of their courses of study to the standards set by the state for graduation or for admission to practice in the fields in which their students seek preparation.

V. THE STATE INSTITUTIONS FOR TRAINING TEACHERS

A. The State Normal Schools

1. Historical sketch.

An examination of the reports of the Superintendents of Public Instruction of New Jersey shows that about the middle of the 19th century the state authorities became aware of the need for improvement in the teaching personnel. Prior to that time the teachers were recruited from academies and colleges, and certificated by local trustees or town superintendents. In his report for 1850, State Superintendent King suggested two avenues for teacher training. The one was that the state should establish a normal school, and the other was that teachers' institutes should be organized. The latter was the first to materialize, since his 1851 report shows that an institute was held in Somerville. State Superintendent Phillips, his successor, strongly recommended both types of training, and in 1854 secured the passage of an act authorizing county teachers' institutes. His report for that year, and the message of the Governor to the legislature, both recommended strongly the establishment of Normal Schools. In 1855 the legislature passed an act establishing the State Normal School which was to be located at Trenton.[34] The school act of 1903 provided that

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[26] Cum. Sup., pp. 1888-1889.

[27] Cum. Sup., pp. 90–93.

[28] Cum. Sup., pp. 566–569; also P. L. 1926, Chap. 72.

[29] Cum. Sup., pp. 1900–1901.

[30] Cum. Sup., pp. 2683–2687 and 1925–1930 Supplement to the Compiled Statutes of New Jersey, pp. 1367–1369.

[31] Comp. Stat., pp. 5708-5709.

[32] Comp. Stat., pp. 9–10.

[33] Chapter X, pp. 283–285.

> State normal schools shall be maintained for the purpose of training and educating persons in the science of education and art of teaching.[35]

The state normal schools established pursuant to this act and to later special acts, and the dates of their establishment were: Montclair, 1907; Newark, 1919; Paterson, 1922; Glassboro, 1923; and Jersey City, 1929.[36]

2. Control and management.

By the provisions of the law, the Commissioner of Education is given charge of "the control and management of all state institutions maintained wholly or in part by state appropriations, whose purpose and object is the training of teachers for the public schools of the state." Any plans for their management, however, are by the same law subject to the approval of the State Board of Education. The Commissioner, with the approval of the State Board, appoints all principals of Normal Schools and all assistants needed in the control and management of these schools.[37]

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[34] State School Reports, 1850–1855.

[35] Code, Sec. 286.

[36] Report of the Commission to Survey Public Education, Authorized by the State Legislature, 1928, p. 104.

[37] Code, Sec. 10.

3. Admission of students.

The law specifies that each county is entitled to at least six times as many pupils in the normal schools as it has representatives in the legislature. Each student upon admission must promise to teach in the state two years after graduation unless excused temporarily by the State Board. In case of failure to teach the two years, the students must refund to the state the cost of the training.[38] Tuition in the normal schools is free.[39]

More specific rules have been laid down by the State Board of Education for the admission of students. Any person desiring admission must present the following credentials:

(a) Statement showing he is 16 years of age or will be 16 within three months of the opening of the term.
(b) A health certificate.
(c) A character testimonial.
(d) A declaration promising to teach in the public schools of New Jersey at least two years after graduation, unless temporarily excused by the State Board, and to forfeit $200 for each school year of training if he fails to teach two years in the state.
(e) Recommendation from high school principal if entering directly from high school, or from county or city superintendent, if entering on teacher's certificate, which certifies to at least one year of successful experience.
(f) A certificate showing graduation from a four-year secondary school course approved by the State Board; or a first-grade county teacher's certificate; or a limited elementary teacher's certificate; or a secondary teacher's certificate.
(g) The passing of such examinations as are prescribed by the Commissioner of Education. This is not required of those entering on teachers' certificates.
(h) Candidates with at least one year of satisfactory work in an accredited college or state normal school may be admitted on transfer.

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[38] Code, Sec. 291.
[39] Code, Sec. 286.

(i) Candidates must be residents of New Jersey, unless non-residents are admitted at the discretion of the Commissioner of Education.[40]

4. The work of the normal schools.

The standard year of the normal schools comprises at least 40 weeks of school and for a two-year course requires 750 clock hours of recitation and laboratory work.[41] Each institution is to offer such curricula as are approved by the State Board of Education.[42] The Trenton and Montclair Normal Schools are authorized to grant the baccalaureate degree to students completing at least 128 semester hours of work in a four-year course.[43] These two institutions are therefore frequently called Teachers' Colleges.

B. Summer Schools for Teachers

Summer schools under state auspices have been an important part of the teacher training program in New Jersey since 1913. In that year they were authorized by law ''for the purpose of training and educating persons in the art of teaching elementary agriculture, manual training, household economics and such other subjects as the State Board of Examiners shall prescribe.''[44] The location of such schools, their courses of study and their management, was by the same law made subject to the approval of the State Board of Education. That body placed their administration definitely under the Commissioner of Education.[45] Tuition is free to all residents of New Jersey and to non-residents who are under contract to teach in the state.[46] Credits earned by students who have satisfied requirements for normal school entrance are accepted at the state normal schools.[47]

C. Extension Courses for Teachers

Extension courses for teachers under the rules of the State Board of Education may be organized by the Commissioner of

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[40] Rules, Nos. 4 and 5, pp. 493–495.

[41] Rules, No. 9, p. 495.

[42] Rules, No. 10, p. 496.

[43] Rules, No. 10, p. 496.

[44] Code, Sec. 486.

[45] Rules, No. 35, p. 499.

[46] Rules, No. 29, p. 499.

[47] Rules, No. 31, p. 499.

Education either as part of the program of the normal schools or as an activity of the Department of Public Instruction. When organized by approved teacher training institutions not under state control, they may receive recognition for credit toward normal school education if approved by the Commissioner of Education. Credit for work pursued in extension courses conducted under the auspices of the normal schools or under the Department of Public Instruction is given by the normal schools on an equivalent time basis.[48]

VI. Special State Schools

The state maintains and controls three special educational institutions, the New Jersey School for the Deaf, and the Manual Training and Industrial School for Colored Youth at Bordentown. These are not in any sense institutions for higher learning.

A. The New Jersey School for the Deaf

This institution, located at Trenton, is open to pupils who are not over 21 years of age of suitable age and capacity who are legal residents of the state. They may remain in the school for a period of not over fourteen years.[49]

The school is under the supervision of the Commissioner of Education,[50] while the State Board of Education is to have the control and care of the buildings and grounds, the provision of funds, the appointment of staff, the provision of equipment and supplies, and the making of rules and regulations for the government and management of the school.[51]

If the parents of any pupil are proved to be unable to contribute toward his maintenance, the State Board of Education may permit such pupil to be maintained without cost to the parents. In other cases the State Board is authorized to determine the proportionate amount of expense for maintenance to be borne by the parents of each pupil.[52]

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[48] Rules, Nos. 31–35, p. 499.

[49] Code, Sec. 309.

[50] Code, Sec. 17.

[51] Code, Sec. 307.

[52] Code, Sec. 309.

Under the rules of the State Board, the school may give trade instruction in day or night classes for deaf employees of the institution.[53]

Teachers in the institution must hold appropriate teachers' certificates.[54]

B. The Manual Training and Industrial School for Colored Youth

This institution, located at Bordentown, is open to colored boys or girls of 14 years of age or over. Applicants must have completed the fifth school year, must present the report card from their last school, must present a certificate of good health from a physician, and must give references as to good moral character. They must be given a medical examination at entrance by a physician, and at such other times as necessary.[55] Each boy must provide a uniform designed by the school and must take full part in the military organization.[56]

Each county in the state is entitled to as many pupils in the school as it has representatives in the legislature.[57] Each county is entitled to two scholarship students, one boy and one girl, who must render additional service in the school beyond that ordinarily required. These scholarship students are selected by the county superintendents.[58] Each student in the school, except scholarship students, must pay regular fees for maintenance, and must give a certain amount of time daily to labor in the institution.[59] Tuition, however, is free.[60]

The supervision, control, and management of the school is in the hands of the Commissioner of Education and of the State Board in the same manner as is the School for the Deaf. The legislature is authorized by law to appropriate not over $12,000 per year to the school to compensate it for surrendering any claim to Federal appropriations.[61] The State Board is authorized to take and condemn land for the grounds of the school, but no money can be expended for such purpose unless appropriated by the legislature.[62]

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[53] Rules, No. 16, p. 497.

[54] Rules, No. 18, p. 497.

[55] Rules, No. 19, p. 497.

[56] Rules, No. 20, p. 497.

[57] Code, Sec. 312.

[58] Rules, Nos. 24–28, p. 498.

[59] Rules, Nos. 21–23, pp. 497–498.

[60] Code, Sec. 311.

[61] Code, Sec. 313.

[62] Code, Sec. 315.

VII. SUMMARY

The development of state interest in higher education in New Jersey has in the past been due very largely to the desire of the state to avail itself of the various Federal grants of money or scrip, beginning with the acceptance in 1862 of the provisions of the first Morrill Act. These Federal grants, however, have been supplemented by state grants or appropriations for various purposes, all of which have tended to build up at Rutgers College a number of units which pertained chiefly toward technical and scientific education. These units were, in 1917, consolidated for the most part in one department of Rutgers College, which was designated by the legislature ''The State University of New Jersey.'' To this, other units have been added from time to time. All of these units, except the Agricultural College Experiment Station, have been under the control of the Board of Trustees of Rutgers College, but are at the same time under the supervision of a state body called the Board of Visitors. In 1929, the creation of the State Board of Regents, to study, coordinate, and control the state's interest in higher education, opened the way to a new period of development.

The interest of the state in maintaining high standards in higher institutions not under its control is protected through its control of their incorporation, their degree-granting privileges, and the entrance of their graduates into professional careers.

The state's responsibility for training its public school teachers is cared for through the State Normal Schools and Teachers' Colleges; the courses for teachers of vocational subjects in Rutgers College, under the Smith-Hughes appropriations; and the state summer schools and extension courses for teachers.

Special types of education, more on the secondary than on the higher education level, are provided in the New Jersey School for the Deaf at Trenton, and in the Manual Training and Industrial School for Colored Youth at Bordentown.

CHAPTER V

THE LEGAL STATUS OF LOCAL SCHOOL UNITS AND THEIR BOARDS OF EDUCATION

I. The Legal Status of the Local School Unit

The development of the New Jersey system of public schools is marked by three rather distinct periods. In the earliest period the tendency of state policy and state legislation was to encourage the people in the various communities to establish and support schools, and to give state aid to such as did so in an approved fashion. In the rural areas this resulted in the district system, by which townships were divided into several such small units, some of which were incorporated as districts, and others not incorporated. In many such instances the districts were small towns or boroughs, which usually were incorporated. The cities, however, which were generally operating under charters, usually organized and controlled their schools under the provisions of such charters. In some cities the board of education was independent of the municipal government in its finances, in others the budget was controlled by the common council, or by the municipal board of finance. In some, title to school property was vested in the board of education, and in others in the municipal government. The same situation existed with regard to the selection of school sites and the erection of buildings. In some cases boards of education were incorporated and independent of the municipality, in others they were mere departments of the city government. School bonds for capital outlay in any district were issued only on authorization by act of legislature. State Superintendent Apgar pictured these conditions graphically in his 1879 report, in which he compiled a history of educational legislation in New Jersey from 1817 to 1880.[1]

The attack upon the district system was begun as early as 1858 by State Superintendent Phillips, who recognized, however, that a change at that time was premature. In 1867 the prevailing district unit was even strengthened by an act making school districts separate corporations from the townships. State Superintendent Apgar, in his 1873 report, strongly recommended the abolition of the local district system and the adoption of the township unit, and pictured clearly all the evils attending the use of the smaller unit.[2] The real battle for the township unit, however, was fought by Superintendent Poland from 1892 to 1894, and resulted in the Olcott School Bill of 1894, which, on passage, abolished the district system in favor of the township system, except for cities and boroughs. The following year it was provided further that no new borough when created should become a separate school district unless it contained at least 400 census children.

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[1] State School Report, 1879, pp. 38–58.

The agitation for an improved state school system was continued in respect to the cities, and in 1900 the Stokes Law

> * * * provided a uniform system for the cities, made all Boards of Education separate municipal corporations, and gave them full control of and title to school property. The rural districts [had] been separate corporations since 1867, and the title to school property [had] always been vested in the local Boards of Education. The Stokes law simply extended these provisions to cities.[3]

It is to be noted, however, that the law did not then, and does not now establish the city board of education or the city school district as an organization financially independent of the municipal government of the city.

If the first period of development in the state school system was marked by strong localism and subdivision, and the second period by the establishment of a larger rural unit and the partial independence of city boards of education, the third has been marked by a tendency toward special legislation for the benefit of the larger and more powerful districts, and by the recognition in legislation of an ever-increasing number of special type districts or units. Examples of these units are districts composed of two or more municipalities; incorporated towns having a population of 10,000 or over; first-class cities; second-class cities; third-class cities; cities having a population of 45,000 or over; first, second, or third-class counties; cities that wish to operate under the township system; townships or boroughs that wish to operate under the city system. In other words, there is evidence of the persistence of that feeling of local independence which made the conditions of the first period possible and which is now building up a series of exceptions to the general state system, some of which are trivial in significance and others of which represent exclusive grants of wide powers. There has been a lack of clearly defined legislative policy toward the organization of the state school system, therefore, which makes evident at the present time the need for a careful study and for a re-definition of the functions of the state system as a whole and of its various units.

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[2] State School Report, 1873 (Apgar).
[3] State School Report, 1903 (Baxter), p. XLVII.

A. Classification of School Districts

At the present time there are fundamentally the two types of local units previously mentioned:

1. The city school districts, governed under the provisions of Article VI of the school law, and commonly called ''Article VI districts'';[4]
2. The school districts in townships, boroughs, and incorporated towns, governed under the provisions of Article VII, and commonly known as ''Article VII districts.''[4]

All other local units, with the possible exception of the county boards of vocational education, are variations or alterations of one or the other of these two types. The variations of these two fundamental types are:

1. The city school district which decides by vote of the people to operate under the provisions of Article VII.[5]
2. The township, borough, or incorporated town school district which decides by vote of the people to operate under the provisions of Article VI.[6]
3. The consolidated school district, which is composed of two or more townships, boroughs, or incorporated towns, when so voted by a majority of the voters of each of the districts concerned. Such school districts are governed largely by provisions for Article VII districts.[7]

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[4] Code, Sec. 45.
[5] Code, Sec. 358.
[6] Code, Sec. 357.
[7] Code, Sec. 160.

4. Union-graded schools, which may be established by the boards of education of two or more adjoining school districts. In such organizations a committee composed of members of the boards of education of the districts establishing the school is to be the board of education of such school. After July 1, 1932, all union-graded boards are to be governed by the provisions of the regional board act. It is to be noted that the creation of a union-graded school does not unite the school districts supporting it into an organic unit, but simply creates a special board of education to control a certain school. Since the passage of this law only one union-graded school has been established.[8]
5. The regional board of education, provided for in 1931[9] in order to make possible the establishment of special type schools, such as junior high schools, by a unit larger than the single district. Any two or more school districts may unite under certain conditions to establish such boards, which operate under powers and provisions similar to those granted in Article VII districts.
6. Minor variations noted are:
    (a) School districts in first-class cities (population 150,000 or over);
    (b) School districts in cities having a population of 45,000 or over;
    (c) School districts in third-class cities (those under 12,000 population and not binding upon the Atlantic Ocean and not being seaside or summer resorts);
    (d) Districts composed of two or more municipalities;
    (e) Incorporated towns having a population of 10,000 or over.

It is to be noted that in addition to the Article VI and Article VII districts and their variations, there are county boards of vocational education, and county boards of vocational education for continuation schools, both of which may be classified as local units, or possibly as intermediate units, for the specific purposes which they serve.

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[8] Code, Secs. 203–215; P. L. 1931, Chap. 275.
[9] P. L. 1931, Chap. 275.

B. The Origin and Nature of the School District

1. The political character of the school district.
   (a) It is a political sub-division of the state:

> A school district is a political sub-division [of the State] of limited powers dealing with school government only and can in no way be deemed to be affected by general municipality legislation * * * in which it is not specifically named.[10]

   (b) It is a municipal corporation or municipality:

> The Constitution has * * * made the public school system a special subject for legislation. The boundaries of a school district are co-extensive with those of the municipality in which it is situate, but the school district is a separate and distinct municipal corporation and the members of the Board of Education are not city officers.[11]

2. The school district is co-extensive with certain political sub-divisions. The law specifies that

> Each township, city, incorporated town and borough shall be a separate school district, but each incorporated village shall remain and be a part of the school district in which said incorporated village shall be situate at the time of its incorporation.[12]

3. School districts represent a delegation of a portion of the state's power from the legislature, which may withdraw or alter such grant of power. In other words, school districts are created by the authority of law passed by the legislature, and that body may at any time change, subtract from, or entirely withdraw such legislation, within the limits set by the constitution.

> The legislature may by special act create school districts, leaving their government and the maintenance and support of the public

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[10] Sutton v. Board of Education of Dennis Township, State School Report, 1928, p. 46, decision of Com. of Ed., Oct. 4, 1927, affirmed by St. Bd., Feb. 4, 1928. See also Landis v. School District No. 44, 57 N. J. L. (28 Vr.) 509.

[11] In the Matter of the Application of Wilson Taylor, etc., State School Report, 1912, p. 117, decision of Com. of Ed., Aug. 22, 1912. See also Arnold v. Board of Education of Ewing Township, S. L. D., p. 17, decision of Com. of Ed., Oct. 26, 1914. See also Fischler v. Board of Education of Union Township (in *MSS.*), decision of Com. of Ed., May 7, 1930, affirmed by St. Bd. (contains opinion upon this point by Attorney-General of New Jersey).

[12] Code, Sec. 45.

schools therein to be regulated by general laws enacted in their behalf.[13]

It is not a constitutional right of the people to have all matters of local concern intrusted to municipal corporations, but within constitutional limits the people, acting through the general legislature, may delegate to the municipalities such portion of political power as they may deem expedient, may withhold other powers, and may withdraw any part of that which has been delegated.[14]

If there is any doubt in the mind of the court whether a school district or other municipality possesses a certain power, it is not likely to be conceded:

In construing a grant of power to a municipality any fair reasonable doubt concerning the existence of the power is resolved against the municipality, and the power is denied.[15]

4. The formation of school districts is not a contract between the legislature and the people:

The grant of powers of local government to a municipal corporation is not a contract, but an exercise of legislative power; and the legislature may, at any time, take away, resume, or limit such power.[16]

Public corporations, such as counties, towns, and cities, are not within the principle that renders laws impairing the obligation of contracts unconstitutional, but the legislature may modify or destroy them as the public good requires.[17]

5. The school district is not a branch or department of the municipal government, but is independent:

The School Act of 1903 (Pamph. L., p. 14) constitutes each board of education of a city school district a body corporate, with the right to sue and be sued by its corporate name, and such boards are not mere departments of the city government.[18]

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[13] Howe v. Board of Education, 72 N. J. L. (43 Vr.) 158, 60 A. 518.

[14] Van Cleve v. Passaic Valley Sewerage Comrs., 71 N. J. L. (42 Vr.) 183, 58 A. 571. See also State Highway Commission v. Elizabeth, 102 N. J. Eq. 221; Federal Shipbuilding and Dry Dock Co. v. City of Bayonne, 141 A. 455, decree affirmed; Federal Shipbuilders and Dry Dock Co. v. Same, 144 A. 918; City of Elizabeth v. State Highway Com., 143 A. 916, affirming decree (Ch.) State Highway Commission v. City of Elizabeth, 140 A. 335.

[15] Federal Shipbuilding and Dry Dock Co. v. City of Bayonne. See footnote [14] *supra.*

[16] (1852) State, Fish pros. v. Branen, 23 N. J. L. (3 Zab.) 484; (1854) Paterson v. Society, 24 N. J. L. (4 Zab.) 385; (1873) Rader v. Southeasterly Road District, 36 N. J. L. (7 Vr.) 273; (1869) Jersey City v. Jersey City, etc., R. Co., 20 N. J. Eq. (5 C. E. Gr.) 360.

[17] (1869) Jersey City v. Jersey City, etc., R. Co., 20 N. J. Eq. (5 C. E. Gr.) 360; (1857) Tinsman v. Belvidere R. Co., 26 N. J. L. (2 Dutch.) 148.

[18] Merry v. Board of Education of City of Paterson, 100 N. J. L. 273.

6. The legislature may force a school district upon the people, and against their will:

> The legislature may force a municipal corporation upon the corporators against their consent, though such acts are contrary to the principles and genius of our government.[19]

7. A school district may exist as a *de facto* district, and as such its authority must be respected:

> A municipal government which is organized under an act of the legislature, which is subsequently adjudged to be unconstitutional, is a government *de facto,* and its authority must prevail and be respected until the attorney-general interposes by *quo warranto,* and secures the actual ouster and removal of the incumbents in office.[20]

8. Under existing laws, new school districts may be created when new municipalities are created by division of a former municipality.[21] This law provided that when by authority of legislative enactment a municipality is divided into two or more smaller municipalities, such municipalities are to continue as one school district until the voters of one of the municipalities shall in public election decide that the school district is to be divided into two or more school districts.

However, when a new municipality, such as a borough, is created out of parts of two former municipalities, such as townships, it has been held that this law does not apply, in respect to the provision that there shall be only one school district until such time as the voters of at least one of the municipalities vote to form a separate school district. If this were not the interpretation, there would exist two school districts, each composed of an entire municipality and a portion of another:

> The School Law recognizes a school district consisting of a single municipality and also a district consisting of two or more municipalities such as a consolidated district and the district provided for in Chapter 191, P. L. 1924, but not a district consisting of a municipality and a portion of another * * *.[22]

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[19] Paterson v. Society, 24 N. J. L. (4 Zab.) 385.

[20] State ex rel. Attorney-General v. Dover Township, 62 N. J. L. (33 Vr.) 138, 41 A. 98.

[21] Code, Sec. 45.

[22] Board of Education of Township of Hanover v. Board of Education of Borough of Mountain Lakes, State School Report, 1925, p. 268, decision of Com. of Ed., Nov. 24, 1924.

It was held that in such cases the new municipality upon its creation became at once a separate school district.

Whenever a new school district is created, certain adjustments between the old and the new district must, of course, be made.[23] The old district remains in control of all property and finances until the close of the school year. Any balances in the hands of the old district at the close of the year are to be divided between the two districts by the county superintendent; such part of this balance as comes from state funds is divided on the basis of aggregate days' attendance of pupils from the two districts, and any portion of the balance coming from local revenue is divided on the basis of ratables. The county superintendent is also required to make a division of all assets and indebtedness of the original district from which the new district or districts are formed, except such indebtedness as was incurred for capital outlay. This division is to be made on the basis of total ratables. By a recent law, this provision is supplemented by the requirement that in case of such division of a school district, by which a part forms a new district or a part of another district, such new district or the district to which the portion is added, shall assume liability for such proportion of the entire indebtedness of the whole original district at the time of division as the ratables of the seceding district bear to the ratables of the whole original district.[24] In respect to the school property, it is provided that whatever lies within the boundaries of either district will become the property of that district. If the new district shall acquire such property, and any indebtedness exists against it, the new district is required to assume final liability for the indebtedness, but since the indebtedness was originally incurred by the old district, the latter must pay the amount due, and collect from the new district, together with any interest on the indebtedness. In this connection the court has held in McCully v. Board that "the old board of education is primarily liable to a holder of such indebtedness."[25] The court has applied this principle to other types of obligations of the old district, likewise, as is noted in the following decision:

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[23] Code, Secs. 46, 47, and Secs. 402–405.

[24] P. L. 1931, Chap. 270.

> After a judgment was obtained against the board of education of the township of Ridgefield, and an execution was issued upon it in pursuance of the act of 1900 (Pamph. L., p. 280), a portion of the territory of Ridgefield was severed from it by legislative action and added to other municipalities. Held, that in the absence of any legislative declaration to the contrary, Ridgefield owns all the property within its present limits, and is liable for all debts contracted before the severance of its territory.[26]

In respect to contracts, the same principle holds:

> Where the legislature creates a new municipal corporation, embracing part of the territory of an existing municipal corporation it may impose on the former the obligation of existing contracts of the latter; but, in the absence of legislation to that effect, the old corporation remains liable for pre-existing obligations.[26]

This was held to cover teachers' contracts as well as other types of obligations:

> School Law (P. L. 1903 [2d. Spec. Sess.], p. 15), § 34, providing that in any new school district the board of education in its corporate capacity shall become vested with the title to all school property in the district, and, if there be any indebtedness for the erection, purchase, or repair of such property, it shall be assumed by and become the obligation of the board of education of the new district, does not impose on the new district the obligation of a contract with a teacher.[27]

This decision was upheld by that in the case of Glazer v. Flemington.[28]

As was stated, when a new district is created, any balances remaining at the end of the year are divided between the two districts. The board of education of the old district, however, cannot take advantage of its temporary control of finances to use up any probable balances:

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[25] McCully v. Board of Education, 63 N. J. L. (34 Vr.) 18, 42 A. 776.

[26] McCully v. Tracy, 66 N. J. L. (37 Vr.) 489, 49 A. 436. See also Board of Education of Borough of Flemington v. State Board of Education, 81 N. J. L. 211, 81 A. 163.

[27] Board of Education of Borough of Flemington v. State Board of Education. See footnote [26] *supra.*

[28] Glazer v. Flemington, 91 A. 1068, 85 N. J. L. 384, affirming judgment Board v. State Board, 81 A. 163, 81 N. J. L. 211.

> It is the opinion of the Commissioner that the legislature intended to confer on the Board having charge of the schools no authority to make extraordinary repairs after a section of a district has been set off. Extraordinary expenditures not required because of emergencies for which contracts are made after the separation of the district cannot deprive the district which includes the section set off from receiving its proportional share of moneys which should have remained as balances.[29]

9. Formation of new districts by consolidation.

A further method of forming or creating school districts is by consolidation either of municipalities or of two or more former school districts. The latter seems to be specifically provided for in the law only for township, incorporated town, or borough school districts (Article VII districts).[30] Such consolidated districts are created only by consent of a majority vote at an election in each of the districts concerned, and, when formed, become liable to all the obligations of the districts from which they were created:

> The plaintiff's [teacher's] right to recover for services as teacher is not barred by the fact that he was employed by the trustees of a district afterwards consolidated with another district, the new district having become entitled to all the property, rights and assets of, and liable to all just claims against the several districts.[31]
>
> The bonds of the districts consolidated become the legal debts of the consolidated districts on such consolidation, under act, May 25, 1894 (3 Gen. Stat., p. 3059).[32]

Formation of a city by consolidation of two or more other municipalities, of course, results in the creation of a new city school district. The essential difference between this type of consolidation and that previously described is that, while the city school district becomes vested with the property of the original districts, and liable for their obligations, the finances, including assessment and taxation of property for each original board of education, are maintained independently until all existing obligations are paid.[33]

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[29] Upper Deerfield Township Board of Education v. Deerfield Township Board of Education, S. L. D., p. 281, decision of Com. of Ed., Dec. 7, 1926.

[30] Code, Secs. 160–164, and P. L. 1929, Chap. 342.

[31] Sproul v. Smith, 40 N. J. L. (11 Vr.) 314.

[32] McCully v. Board of Education. See footnote [25] *supra.*

[33] Code, Secs. 395–401.

C. Liability of the Local School Unit to Municipal Action or Control

1. The property of the school district is not liable to local municipal taxation and assessment.
   (a) Exemption of school district property lying within the district. The New Jersey statutes specifically exempt from taxation

   > * * * property of the respective counties, school districts, and taxing districts, when located therein and used for public purposes, or for the preservation or exhibit of historical data, records or property, but this exemption shall not include real property bought in for debts or on foreclosure of mortgages given to secure loans out of public funds or out of money in court, which property shall be taxed unless devoted to public uses.[34]

   (b) Exemption of school district securities and bonds. The same act provides exemption from taxation of

   > * * * all bonds, securities, improvement certificates and other evidences of indebtedness, heretofore or hereafter issued by this State or by any county thereof, or by any taxing district or school district of this State.[34]

   (c) Exemption of land belonging to a school district but lying in another municipality.

   > Where any land, used for public purposes, belonging to one municipality extends into an adjoining municipality * * * said land, together with the improvements thereon shall be exempt from taxation; provided, however, that the area of said land so extending into the adjoining municipality or county shall not exceed five acres in area.[35]

   This point is discussed in a number of decisions by New Jersey courts. In one of them, Newark v. West Paterson, the opinion of the court was in part as follows:

   > The difficulty in the instant case is that public property devoted to public use is taxed in part and exempted in part—is taxed if located outside of the taxing district and exempted if

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[34] P. L. 1903, p. 394.

[35] Cum. Sup., Vol. 2, p. 3488 (P. L. 1922, Chap. 170, supplementing P. L. 1918, Chap. 236).

> located within the taxing district. That is an attempted classification condemned in Essex County Park Commission v. West Orange, *supra*. The several assessments of taxes brought up will be set aside, with costs.[36]

An equivalent decision was rendered in Jersey City v. Blum.[37]

(d) Exemption of school district property from local municipal improvement assessments.

Only in school districts consisting of two or more municipalities has provision been made in law for paying assessments for municipal improvements, such as sidewalks and street paving. In such cases the board of education may, in its discretion, make an agreement with the governing body of the municipality by which such assessments may be paid by the board of education.[38] In other types of school districts it seems that the board of education is exempt from necessity for paying such assessments. The basic decision on this point seems to be that of Maplewood Township v. South Orange Township Board of Education, in which the following opinion was given:

> The relator levied an assessment against the land of respondent for a public improvement which it refuses to pay, and the relator applies for a rule to show cause why an alternative or peremptory writ of mandamus should not issue to compel it to levy a tax for that purpose. * * * The board of education refuses to pay because it claims that the property of school districts are exempt from the payment of an assessment for local improvements. The real question seems to be whether an assessment for benefits is different in effect from taxes, it being the law that school property is not taxable. We think that an assessment to raise money to pay a public burden is not a tax within the meaning of the statute relating to taxation, but the trouble is there does not appear to be any statute establishing the power of a school district to raise money for any such purpose. This writ, if allowed, will require the inclusion of the assessment in a tax levy, and we cannot find the authority. The district can only raise money for educational purposes and

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[36] Newark v. West Paterson, 2 N. J. Misc. Rep. 190.
[37] Jersey City v. Blum, 2 N. J. Misc. Rep. 188.
[38] Code, Sec. 521.

> an assessment is not within such purpose as defined by law. If it is a lien on the property it can be enforced in another way than by mandamus. We think the rule to show cause should be denied, as the writ would require the raising of money by taxation without authority of law.[39]

An exception to this principle is noted in an opinion by the Commissioner of Education based on an opinion of the Attorney-General:

> It is plain that except in cases where a school district takes the title to property with the lien of a municipal improvement assessment already against it, there is no liability for the payment of such assessment to the municipality.[40]

2. The school district is not subject to local building regulations, such as the securing of local building permits. This question was definitely settled by an act of 1928 which provided

> * * * that nothing in this or any act shall require the board of education of any school district to secure approval of its plans and specifications by, or to require any board of education or any contractor doing work in connection with school buildings to secure a building permit from the municipality situate therein.[41]

3. Where not specifically provided by law, as, for instance, where the city treasurer is ex-officio custodian of school moneys, city officers, such as city attorney, are not to act for the school district, but the school district selects its own officers:

> The School Act of 1903 (Pamph. L., p. 14) constitutes each board of education of a city school district a body corporate, with the right to sue and be sued by its corporate name, and such boards are not mere departments of the city government; therefore, such boards are not dependent upon the regular city attorney or counsel to act for it in litigation, but may employ their own counsel for such purpose.[42]

4. The question of dependence or independence of school districts in relation to municipal authorities in school finance,

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[39] Township of Maplewood v. Board of Education of Township of South Orange, 1 N. J. Misc. Rep. 75.

[40] *Education Bulletin,* Vol. XIV, No. 5, Jan., 1928, p. 136.

[41] Code, Sec. 200; P. L. 1928, Chap. 186.

[42] Merry v. Board of Education of City of Paterson. See footnote 18 *supra.*

school building operations, and contracts will be discussed in the chapters devoted to such matters.[43]

II. THE LEGAL STATUS OF THE BOARD OF EDUCATION IN THE LOCAL SCHOOL UNITS

The board of education in the school districts and in other local school units in New Jersey wields immense power over the organization and work of the school unit and of the schools. In a very real sense these bodies are the legislative, executive, and judicial bodies for the local schools, within the limits set by law, and subject only to such controls as the legislature may establish by law or may have provided through the various administrative officers or bodies of the state, or subject to the control of the courts.

A. General Characteristics

There is sufficient variation in general characteristics of the various boards of education in the different types of units, to make it advisable to give a description of each in outline form. In this outline (Table I) variations in the characteristics of the Article VI or city school districts are noted, such as those pertaining to boards in first-class cities (those having a population of 150,000 or over), or those pertaining to cities having a population of 45,000 or over. There are likewise two types at least of boards of education operating under Article VII, the general or usual type, and the type found in incorporated towns having a population of 10,000 or more. The consolidated school district board, which is included as a separate type, the union-graded school board of education, and the regional board of education established by law in 1931, are patterned in many respects so far as their activities are concerned after Article VII boards of education. Finally, the county board of vocational education represents a type of local board of education which will need separate description, as being organized in an entirely different manner from the usual local board, and for a special purpose.

The following table or outline gives essential facts concerning the general organization of all of these types of boards of education.

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[43] School finance, see Chapter VIII, pp. 217–230, 252–254. School building operations, and contracts, see Chapter VII, p. 178.

B. Nature and Functions of the Local Board of Education

The Board of Education of the New Jersey School District is not a continuous body. When the terms of any of the members expire, the board which was in existence ceases to exist, and the members remaining can transact no business until the board reorganizes by the election of its officers. This non-continuity of the board is brought out in the following:

> The Supreme Court in the case of Gulnac vs. The Board of Chosen Freeholders of Bergen County, 45 Vroom 543, said, ''Although only a portion of a board of freeholders goes out of office each year, the body itself is not a continuous body (State vs. Rogers, 27 Vroom 480). The reasons which led to the decision that the Senate of New Jersey is not a continuous body are quite as cogent in the case of a board of freeholders.'' The same reasoning applied to a board of education leads to the conclusion that it is not a continuous body.[44]

In New Jersey the Board of Education, not the school district or other local school unit, is a body corporate. The specific nature or capacity of these boards as bodies corporate as enumerated in the laws[45] are as follows:

1. To sue and be sued; this power is not expressly specified for the county vocational board;
2. To adopt an official seal;
3. To make rules and regulations;
4. To take and condemn property (right of Eminent Domain);
5. To issue bonds; this power is given only to Article VII boards and to consolidated boards and regional boards, whose powers are modeled after those of the Article VII board, and to all such boards only on consent of the voters forming their particular constituencies. Union-graded school boards which desire funds for capital purposes must apply to the boards of the districts which support the

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[44] Nicholson v. Board of Education of Borough of Swedesboro, S. L. D., p. 202, decision of Com. of Ed., Nov. 10, 1911, affirmed by St. Bd., Feb. 3, 1912, reversed by Supreme Court, May 21, 1912 (54 Vr. 36).

[45] Article VI districts, Code, Secs. 59, 61, 63 and 65 A; Article VII districts, Code, Secs. 125, 127, 138 and 143; Consolidated districts, Code, Sec. 162; Union-graded School Board of Education, Code, Secs. 207–215; Regional Board of Education, P. L. 1931, Chap. 275, Secs. 3 and 6; County Vocational Board, Code, Secs. 437, 438.

TABLE I

CHARACTERISTICS OF SCHOOL BOARDS AND SCHOOL BOARD MEMBERSHIP IN NEW JERSEY

(Sections of law noted refer to School Laws of 1928)

	Article VI Districts	Article VII Districts (General)	Article VII Districts (Incorporated Towns Pop. 10,000 or Over)	Consolidated Districts (Article VII Only) Two or More Districts	Union-Graded School Board of Education	Regional Boards of Education	County Vocational Boards
Qualifications of Board Members (All Types of Boards)	1. Must be citizen and resident of territory contained in school district, for at least 3 years immediately before becoming member of board. (Secs. 55, 124.) In case of County Vocational Board must have been citizen and resident of county for 3 years. (Sec. 435). 2. Must not be interested directly or indirectly in any contract with or claim against board. (Secs. 55, 124.) 3. Before entering on duties as member, must take oath of office. In Article VI districts, oath is filed with city clerk; in Article VII districts, with district clerk. (Secs. 56, 126.) 4. Must be able to read and write. (Secs. 55, 124.) 5. No religious test to be required. (Sec. 639.)						
Size of Board	1. Generally 5 (Sec. 51). 2. Cities with pop. of 45,000 or over, 5, unless voters in regular election make it 9 (Sec. 51). 3. First-class cities with pop. over 150,000, 9 (Sec. 54).	9, unless board decides to reduce number, in which case voters reduce to 5 or 3 by election. (Secs. 116-117.)	Same as for other Article VII districts.	If two districts unite, same number as for Article VII districts generally. If more than 2 districts, 9 members, divided among original districts on basis of population. (P. L. 1929, Chap. 342.)	If two districts unite, 2 members from each district board. If more than 2 districts, 1 member from each district board. (Sec. 204.)	9 members, at least one from each district. Otherwise, in proportion to population. (P.L. 1931, Chap. 275).	5 members. (Sec. 434.)

TABLE I—Continued

CHARACTERISTICS OF SCHOOL BOARDS AND SCHOOL BOARD MEMBERSHIP IN NEW JERSEY

(Sections of law noted refer to School Laws of 1928)

Term of Members	1. Generally, 5 years. (Sec. 51.) 2. Cities 45,000 or over 5 yrs. for 5 member boards; 3 yrs. for 9 member boards. (Sec. 51.) 3. First-class cities 150,000 or over, 3 yrs. (Sec. 54.)	3 years. (Secs. 116-117.)	Same as for other Article VII districts.	Same as for other Article VII districts.	Same as for their period of membership on district boards. (Sec. 205.)	3 years. (P.L. 1931, Chap. 275).	4 years. (Sec. 434.)
Method of Selection of Board Members	Appointed by Mayor or other chief executive officer. (Sec. 51.)	Elected by voters at annual meeting. (Sec. 116.)	Appointed by Mayor or other chief executive officer (Sec. 121), except that any new districts in this class may decide by referendum of voters whether board shall be elected by people or appointed by Mayor, etc. (P. L. 1929, Chap. 280).	Elected by voters at annual meeting. (P. L. 1929, Chap. 342).	Appointed by boards of education of districts supporting the union-graded school. (Sec. 204.)	In each component district, members to be elected in samemanner as in original district. (P. L. 1931, Chap. 275).	County Supt. ex-officio, other 4 members appointed in first-class counties by county supervisor; in second-class counties having pop. of 180,000 by directors of board of chosen freeholders; in all other counties by Judge of Court of Common Pleas. (Sec. 434 and P. L. 1929, Chap. 321).
Removal of Members (All types of boards.)	1. For failure to attend three consecutive regular meetings of board without good cause, may be removed by board. (Secs. 57, 136). Provision found for Article VI and Article VII boards only. 2. May be removed by court following indictment and conviction for certain offenses. (Sec. 684.)						

TABLE I—(Continued)

CHARACTERISTICS OF SCHOOL BOARDS AND SCHOOL BOARD MEMBERSHIP IN NEW JERSEY

(Sections of law noted refer to School Laws of 1928)

	Article VI Districts	Article VII Districts (General)	Article VII Districts (Incorporated Towns Pop. 10,000 or Over)	Consolidated Districts (Article VII Only) Two or More Districts	Union-Graded School Board of Education	Regional Boards of Education	County Vocational Boards
Provision for filling vacancies	By Mayor or other appointing officer for unexpired term, within 30 days after notice from Secretary of Board. (Sec. 51.)	1. When due to failure to elect, Co. Supt. appoints members to serve until next election of members. (Sec. 36.) 2. Ordinary vacancies filled by board until next annual meeting, then by voters for unexpired term. (Secs. 127, 116.)	1. When Mayor or other officer appoints members, he also fills vacancies within 30 days after notification by Sec'y of Board. 2. When people elect members, vacancies are filled as in regular Article VII districts. (P. L. 1929, Chap. 280).	In each component district as provided by law for districts of that type. (P. L. 1929, Chap. 342.)	To be filled by board of education of district whose representation on union-graded school board was reduced by vacancy. (Sec. 206.)	In each component district as provided by law for districts of that type. (P. L. 1931, Chap. 275.)	By appointing officer within 30 days after occurrence of vacancy, for unexpired term. (Sec. 434 and P. L. 1929, Chap. 321.)
Date of Annual organization.	First-class cities, 150,000 or over, July 1, or following day if July 1 is Sunday. In all other Article VI districts, Feb. 1, or following day if Feb. 1 is Sunday. (Secs. 52, 54.)	First Monday in April, or earlier if board desires. (Sec. 126.)	Same as for regular Article VII districts.	Same as for regular Article VII districts.	Second Tuesday in April. (Sec. 208.)	First Monday in April. (P. L. 1931, Chap. 275.)	Nov. 1, or following day if Nov. 1 is Sunday. (Sec. 436.)
Meetings of Board.	Not stated in law. Subject to rules of board.	At least bi-monthly while schools are in session. (Sec. 133.)	Same as for Article VII districts generally.	Same as for Article VII districts generally. (P.L. 1929, Chap. 342.)	Same as for Article VII districts generally. (Sec. 211.)	Same as for Article VII districts generally. (P.L. 1931, Chap. 275.)	No provision in law. Subject to rules of board.

TABLE I—Continued

CHARACTERISTICS OF SCHOOL BOARDS AND SCHOOL BOARD MEMBERSHIP IN NEW JERSEY

(Sections of law noted refer to School Laws of 1928)

Officers of Board.	1. President and Vice-Pres. elected at annual organization meeting for 1 yr. (Sec. 52.) 2. Secretary. May be member of board. Term set by board rules. (Sec. 64.) 3. Custodian of School Moneys. City Treasurer to act ex-officio. (Sec. 82.) When district contains more than one municipality, board appoints custodian. (Sec. 281.) 4. Superintendent of Schools. Elected by majority vote of entire board which also fixes term and salary; term of first appointment not over 5 yrs., thereafter may be indeterminate. (Secs. 64, 84 and P. L. 1931, Chap. 272.) 5. Auditor. Comptroller or auditor of municipality to be auditor ex-officio of school district. (Sec. 82.) 6. Business Manager. Appointment permissive. Elected by majority vote of entire board which fixes term and salary. (Secs. 64, 91.)	1. President and Vice-Pres. elected at annual organization meeting for 1 yr. (Sec. 126.) 2. District Clerk. Election mandatory. May be member of board. Term to be fixed by board. (Sec. 135.)	Same as for Article VII districts generally.	Same as for Article VII districts generally.	1. President, elected at annual organization meeting. Term, 1 yr. (Sec. 208.) 2. Secretary, elected at annual organization meeting. Term, 1 yr. May or may not be member of board. (Sec. 208.) 3. Custodian of School Moneys. To be a "suitable person," appointed by board, which fixes salary and term. (Sec. 208.)	1. President and Vice-Pres. elected at annual organization meeting for 1 yr. 2. Secretary appointed by board for 1 yr. 3. Custodian of School Moneys appointed and term fixed by board. (P. L. 1931, Chap. 275, Sec. 4.)	1. President and Vice-Pres. elected at annual organization meeting for 1 yr. (Sec. 436.) 2. Secretary, appointed by board for term and salary fixed by board. (Sec. 438, XI.) 3. Treasurer, appointed by board for term and salary fixed by board. Must not be member of board. (Sec. 438, V.)

union-graded school, and such boards shall submit to their voters the proposal to issue bonds. Bonds for the use of school boards in Article VI districts must be issued by the governing body of the municipal corporation, and for county vocational boards by the boards of chosen freeholders of the counties.

6. Hold title to all school property.

In addition to these corporate powers, the functions of boards of education are outlined below. These are enumerated only for boards in Article VI and Article VII districts. The functions of boards of education in consolidated districts,[46] union-graded schools,[47] and in regional boards of education,[48] follow closely those of Article VII boards. Those of the county vocational board are more nearly parallel to those of Article VI boards, especially as respects general organization; other functions of the vocational boards will be discussed in another portion of the study.[49]

1. Functions concerning board itself.
    - (a) Power to make rules and regulations for own government and for transaction of business.[50]
    - (b) Power to fill vacancy in board until next election, except vacancy due to failure to elect. (Article VII board only.)[51]
    - (c) Power to remove member of board for failure to attend three consecutive regular meetings, without good cause. (Article VII board only.)[52]
    - (d) Shall elect officers of board.[53]
2. Functions concerning administrative, supervisory, and teaching staff.
    - (a) May elect superintendent of schools, fix term and salary. (Article VI board only.)[54]

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[46] P. L. 1929, Chap. 342.

[47] Code, Sec. 211.

[48] P. L. 1931, Chap. 275.

[49] See Chapter IX, pp. 276–278.

[50] Article VI board, Code, Sec. 65 A; Article VII board, Code, Sec. 127 (III).

[51] Code, Sec. 127 (I).

[52] Code, Sec. 136.

[53] Article VI board, Code, Secs. 60, 64; Article VII board, Code, Sec. 126.

[54] Code, Secs. 64, 84; also P. L. 1931, Chap. 272.

  - (b) May appoint assistant superintendent on nomination of superintendent. Salary fixed by board; removed by majority vote of entire board. (Article VI board only.)[55]
  - (c) Secretary or district clerk must be appointed by board. May be member of board.[56]
  - (d) May elect teachers, principals and surpervisors.[57]

3. Functions relative to appointment of other employees or members of staff.
   - (a) All boards required to employ a medical inspector,[58] and may employ nurses[58] and operators of dental clinic.[59]
   - (b) Boards may employ playground or recreation staff.[60]
   - (c) Clerks in offices of secretary, superintendent of schools, or business manager. Board determines number and fixes salaries; officer appoints. Specific provision in law for Article VI boards only.[61]
   - (d) Other employees,—boards may employ and fix compensation and terms. Article VI boards may appoint "agents and employees";[62] Article VII boards may employ "janitors, mechanics and laborers."[63]
   - (e) All boards must appoint an attendance officer or truant officer, fix his compensation, and make rules and regulations to govern his duties.[64]
4. Functions concerning pupils.[65]
5. Functions concerning schools.
   - (a) Establishment of schools.
     - (1) General provision,—each school district is required to provide suitable school facilities and accommodations.[66]
     - (2) May establish kindergartens.[67]

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[55] Code, Sec. 85.

[56] Article VI board, Code, Sec. 64; Article VII board, Code, Sec. 135.

[57] See Chapter X on "The Legal Status of Teachers, Supervisors, and Principals," pp. 281–283.

[58] Code, Sec. 335.

[59] Code, Sec. 352.

[60] Code, Sec. 672.

[61] Code, Secs. 72, 87, 92.

[62] Code, Sec. 64.

[63] Code, Sec. 127 (II).

[64] Code, Sec. 246.

[65] See Chapter XII on "The Legal Status of the Pupil."

[66] Code, Sec. 196.

[67] Code, Sec. 216.

- (3) May establish intermediate schools (junior high schools) for 100 or more pupils.[68]
- (4) May establish manual training or industrial education schools when approved by State Board of Education.[69]
- (5) May establish vocational schools when approved by Commissioner and State Board of Education.[70]
- (6) Must establish a continuation school when 20 or more children are employed in school district on age and schooling certificates.[71]
- (7) Must establish special classes for children mentally subnormal if there are 10 or more in the district.[72]
- (8) Must establish special classes for blind children (5 or more) and for deaf children (10 or more) when not otherwise provided for.[72]
- (9) Must provide classes or special facilities for crippled children who cannot be educated in regular classes.[72]
- (10) May establish evening schools for residents over 12 years of age[73] or for foreign born.[74]
- (11) May establish foreign-born classes.[75]
- (12) May establish schools for delinquent children.[76]
- (13) May establish dental clinics for indigent children.[77]

(b) Control of schools.

- (1) Board has supervision, control, and management of public schools.[78]
- (2) Board may make rules and regulations for government of schools.[79]

(c) May, on advice of local board of health, close schools in case of epidemics.[80]

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[68] Code, Sec. 331.

[69] Code, Sec. 316.

[70] Code, Secs. 428–429.

[71] Code, Sec. 458.

[72] Code, Sec. 194.

[73] Code, Sec. 219.

[74] Code, Sec. 221.

[75] Code, Sec. 491–492.

[76] Code, Sec. 493.

[77] Code, Sec. 352.

[78] Article VI board, Code, Sec. 64; Article VII board, Code, Sec. 127 (III, XI).

[79] Article VII board, Code, Sec. 65 A; Article VII board, Code, Sec. 127 (III).

[80] Code, Sec. 191.

- (d) Must maintain nine months' term or forfeit apportionment unless penalty is remitted by Commissioner.[81]
- (e) Jointly with county superintendent, may prescribe program of studies, beyond minimum prescribed by Commissioner.[82]
- (f) Board in districts located in municipalities of 10,000 population, may establish free lectures.[83]
- (g) All boards must secure flag and display on school property.[84]

6. Functions concerning school property.
    - (a) May make rules and regulations for government and management of school property.[85]
    - (b) Have supervision, control, and management of public school property in district.[86]
    - (c) Hold title to all school property.[87]
    - (d) May sell property no longer needed.[88]
    - (e) May purchase land, erect school buildings or repair same on proper authorization. Authorization of funds in Article VI district by Board of School Estimate,[89] in Article VII district by vote of people.[90]
    - (f) May purchase not over five acres in adjoining municipality for school purposes.[91]
    - (g) May secure by transfer from municipal authorities or by purchase, and may equip, maintain, and control playgrounds or recreation place.[92]
    - (h) Under certain conditions, may transfer to municipal government for municipal purposes, land and buildings.[93]

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[81] Code, Sec. 50.

[82] Article VII board only, Code, Sec. 127 (VII).

[83] Code, Secs. 603–604.

[84] Code, Sec. 337.

[85] Article VI board, Code, Sec. 65 A; Article VII board, Code, Sec. 127 (III).

[86] Article VI board, Code, Sec. 64; Article VII board, Code, Sec. 127 (III, XI)

[87] Article VI board, Code, Sec. 63; Article VII board, Code, Sec. 125.

[88] P. L. 1929, Chap. 333.

[89] Code, Sec. 97.

[90] Code, Sec. 139.

[91] Code, Sec. 128.

[92] Code, Secs. 668–673.

[93] Code, Secs. 674–678.

- (i) All building plans shall be approved by board.[94]
- (j) Board shall keep property insured.[95]
- (k) May permit use of schoolhouses and grounds for community purposes.[96]
- (l) Must provide suitable toilet facilities.[97]
- (m) May establish and operate cafeterias.[98]
- (n) In Article VI district, may raise money for site and construction, equipment, etc., of storehouse.[99]
- (o) In districts composed of two or more municipalities, may provide teacherages.[100]

7. Functions concerning textbooks and school supplies.
   - (a) Board to furnish textbooks and supplies to pupils of all public schools free of cost.[101]
   - (b) Board required to purchase supplies costing more than $250 after advertisement, except in case of textbooks and kindergarten supplies.[102]
   - (c) Board has authority to select textbooks.[103]
   - (d) Board to make rules and regulations for care of textbooks.[104]
   - (e) Board may provide equipment and supplies for promotion of health of pupils.[105]
   - (f) Board members forbidden to be interested in furnishing textbooks and supplies to district.[106]
8. Functions concerning contracts.[107]
9. Functions concerning finances.[108]
10. Functions concerning reports.

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[94] Code, Sec. 93.

[95] Article VI board, Code, Sec. 64; Article VII board, Code, Sec. 127 (VI).

[96] Article VII board, Code, Secs. 127 (XI), 130. No specific provision for Article VI board.

[97] Code, Sec. 197.

[98] P. L. 1929, Chap. 182.

[99] Code, Sec. 65 B.

[100] Code, Sec. 523.

[101] Code, Sec. 227. Also, for Article VII board, Code, Sec. 127 (IX).

[102] Article VI board, Code, Sec. 66; Article VII board, P. L. 1930, Chap. 48.

[103] Article VII board, Sec. 127 (VII).

[104] Code, Sec. 228.

[105] P. L. 1929, Chap. 182.

[106] Code, Sec. 229.

[107] See Chapter VII on ''Contracts in Public School Business,'' pp. 173–198.

[108] See Chapter VIII on ''The Legal Basis of Financing Public Education,'' pp. 216–261.

- (a) Article VI boards to make annual printed report at close of school year. To contain report on condition of schools and property, and on finances.[109]
- (b) Article VII boards, when annual election is held in two or more places, must furnish copy of annual report and budget for succeeding year in printed form to each voter at election.[110] On or before August 1, must make annual report to county superintendent on blanks furnished by Commissioner.[111]
- (c) All boards must report to county superintendent on or before March 15 data for purposes of apportionment, concerning teachers and pupils.[112]
- (d) All boards must report to county superintendent on or before August 15 concerning pupils entitled to transportation.[113]
- (e) All boards must report attendance monthly of nonresident pupils to boards of sending districts.[114]

11. Miscellaneous functions.
    - (a) Professional meetings of boards.
        - (1) Article VII boards to hold semi-annual county convention.[115]
        - (2) All boards to form "State Federation of District Boards of Education," send one delegate each, and pay dues and expenses of delegate.[116]
    - (b) Boards must enforce rules and regulations of State Board.[117]
    - (c) Article VII boards may call special voters' meetings (elections) under certain conditions.[118]
    - (d) Judicial functions of board.
        - (1) Grant hearings to teachers, janitors, and other employees and officers, in certain cases involving dismissal, etc.[119]

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[109] Code, Sec. 68.

[110] Code, Sec. 119.

[111] Code, Sec. 127 (XIII).

[112] Code, Sec. 273.

[113] Rules, No. 83, p. 511.

[114] Rules, No. 86, p. 512.

[115] Code, Sec. 137.

[116] Code, Secs. 528–533.

[117] Code, Sec. 127 (VII). Article VII boards only. Not specified for Article VI boards.

[118] Code, Sec. 127 (X).

[119] Code, Secs. 71, 179, 391.

(2) Have power to issue subpoenas to compel attendance of proper persons at such hearings.[120]

(3) Board members may administer oaths to witnesses.[120]

C. Membership on the Board of Education

1. The nature of membership on a board of education.

   (a) It is not a contract for service.

   > An appointment to a public office for a term of years and its acceptance, is not a contract between the government and the person appointed, that the latter will serve or that the former will pay during such term.[121]

   (b) It is a municipal office.

   > Trustees of school districts are municipal officers.[122]

   (c) As an office, its nature is indicated in the following definition:

   > An office is a place in a governmental system created or recognized by the law of the state which either directly or by delegated authority assigns to the incumbent thereof the continuous performance of certain permanent public duties.[123]

2. The selection of board members.

   In Table I, it was shown that in Article VII districts board members are elected by the people, while in Article VI districts they are appointed by the mayor or chief executive officer of the municipal government. With the establishment of the commission form of government in many cities, the law gave to the Commission instead of to the mayor the appointment of city officials, and the question arose as to whether this carried over to the appointment of members of the board of education. The decision on this point was that the mayor retained this power:

   > The fact that appointments to positions under the city government are to be made by the Commissioner and not by the Mayor does not

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[120] Code, Sec. 180.

[121] Hoboken v. Gear, 27 N. J. L. (3 Dutch.) 265.

[122] State v. Deshler, 25 N. J. L. (1 Dutch.) 177 (1855).

[123] Fredericks v. Board of Health of Town of West Hoboken (N. J. Sup.), 82 A. 528. See also Hart v. City of Newark, 80 N. J. L. 600, 77 A. 1986.

> affect the appointment of members of the Board of Education, because the members of the Board of Education are not city officials and therefore, are not in any wise controlled by the city charter.
>
> I am clearly of the opinion that the appointment of members of the Board of Education must be made by the person designated for such purpose by the School Law, namely, the Mayor or other chief executive officer of the municipality and not the Commission.[124]

It is interesting to note that as a community evolves from a village or borough into an incorporated town over 10,000 population or into a city, the electorate usually loses control over the school board. It is true that by the provisions of P. L. 1929, Chapter 280, any incorporated town which, according to a state or United States census, attains to a population of 10,000, may within a year after the publication of the census report through its school board submit to the people the decision as to whether their board members shall continue to be elected by the people, or shall be appointed by the mayor. This is an evident attempt to give the voters a voice in the matter.

In the New Jersey city school district, the mayor is a person of the highest influence. His position is described in the unpublished report of the experts to the Commission to Survey Public Education, as follows:

> The authority of appointing members of the board of education and the power to cast the deciding vote with respect to finance [as a member of the Board of School Estimate] places the balance of power in city school districts with the Mayor. Even a casual study of the relation of city school districts to municipal government makes this close and undesirable relationship obvious.
>
> The term of the mayor in New Jersey cities is four years. In case of the five-member Board of Education, it takes three years before the mayor controls a majority of the board; in case of the nine-member Board of Education, the municipal executive can appoint six new members within a two-year period.[125]

3. Qualifications for office for a prospective board member.

In Table I the qualifications described are:

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[124] Ferris et al. v. O'Keefe et al., New Jersey School Law, 1914, p. 340, decision of Com. of Ed., Feb. 4, 1914, affirmed by St. Bd., Apr. 4, 1914.

[125] Unpublished Report of Experts employed by Commission to Survey Public Education. From chapter on "New Jersey City School Organization," by Arthur B. Moehlman, 1928.

(a) Citizenship and three-year residence in district;
(b) The taking of oath of office before entering upon its duties;
(c) Absence of direct or indirect interest in contracts or claims against board;
(d) Religious test forbidden.

From a decision of the Commissioner it seems evident that it is not essential for a person to possess the requisite qualifications at the time he is a candidate, or at the time he is elected or appointed. He must, however, possess them at the time of the beginning of his term of office:

> Members [of a Board] who are elected for the full term take office on the first Monday in April. While they may meet to organize before that date, their terms begin the first Monday in April which is the end of the terms of their predecessors in office. Members of a Board of Education must, therefore, possess the specified qualifications upon that date and a person who is not duly qualified at that time is not entitled to membership on a board of education.[126]

(a) The residence qualifications.

In many cases concerning election of school directors, qualifications of voters, etc., it has been necessary to determine what elements determine residence in any locality. It is evident from the decisions here quoted that in case of doubt concerning his place of residence, the essential determinant is his own intention or his own claim:

> The place where a man is commorant, may perhaps be properly considered as *Prima Facie,* the place of his legal residence; this presumption, however, may be easily overcome by proof of facts to the contrary. If a person leave his original residence, *Animo Non Revertendi,* and adopt another (for a space of time, however brief, if it be done), *Animo Manendi,* his first residence is lost. But if in leaving his original residence, he does so, *Animo Revertendi,* such original residence continues in law, notwithstanding the temporary absence of himself and family. Such is the uniform language of the books, as well as the clear conclusion of common sense.[127]

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[126] Kimball v. Baxter (In *MSS.*), decision of Com. of Ed., Apr. 2, 1931.

[127] Cadwalder v. Howell, 18 N. J. L. 128. See also Debaghian v. Kaffafian, 71 N. J. L. 115; Valentine v. Valentine, 61 N. J. Eq. 400; Edsall v. Graves, S. L. D., p. 26, decision of Com. of Ed., June 27, 1923; O'Brien v.

If a member of a board of education change his residence during his term of office, his status must be determined as provided by law:

> A member of a board of education must not only be a resident of the district at the time of his election, but must continue to be a resident during the term for which he was elected. If he loses his residence he ceases to be a *de jure* member, but continues as a *de facto* member until his office has been declared vacant in the manner provided by law.[128]

(b) Taking the oath of office as a qualification.

Taking the oath of office as required by law is necessary to full legal membership in the board.

> Where a person, who is elected to an office, is required, before entering upon the discharge of the duties thereof, to take and subscribe an oath of a specified form, the taking of an oath essentially in that form is a condition precedent to his complete investiture into the office, and, in contemplation of law, is just as much a requisite to its enjoyment as the election itself.[129]

That failure to take such an oath, however, does not entirely debar him from participating in the board activities, is evident from the following:

> The failure of an officer to take the prescribed oath of office will not prevent his becoming an officer *de facto*.[130]

(c) Disqualification for membership due to interest in contracts with or claims against board.

Having an interest in such a contract or claim, does not prevent one from being a candidate nor invalidate his election:

> As a member [of a board of education] he shall not be interested in a contract with nor claim against the board. The holding of a contract by a candidate does not make votes cast for him illegal. The application of the law is a matter subsequent to election regardless of its effect upon membership on the board.[131]

Board of Education of Town of West New York, S. L. D., p. 28, decision of Com. of Ed., June 13, 1912, affirmed by St. Bd., Dec. 9, 1912.

[128] O'Brien v. Board of Education of Town of West New York. See footnote [127] *supra.*

[129] Hayter v. Benner, 67 N. J. L. (38 Vr.) 359, 52 A. 35 (1902).

[130] Rosell v. Neptune, 68 N. J. L. (39 Vr.) 498, 53 A. 398 (1902).

[131] In the Matter of the Conduct of the Annual School Election in the Township of Washington, Burlington Co., State School Report, 1929, p. 91, decision of Com. of Ed., Mar. 25, 1929, affirmed by St. Bd.

The interpretation of this provision has been extended to cover such cases as that involved in Stoothoff v. Davies, where the person elected was the wife of the medical inspector of the district, who was paid a salary:

> It has been argued that this provision has to do with contracts for materials and labor as distinguished from contracts for professional services. There does not appear to be any valid reason to assume that a contract or a claim for professional services is not contemplated by the Legislature under this provision.[132]

It is evident, however, that proof of direct or indirect interest in contracts or claims against the board does not automatically serve to remove a person from membership. Removal from an office is a distinctly separate legal procedure which will be discussed in a later section of this chapter. The right to determine title to office is a function of the courts.

4. Disputes concerning who is elected or is eligible to the office.

When there is any dispute concerning who is elected or who is legally a member of a board of education, it has been held that it must be referred to the Commissioner of Education as being a dispute under the school law:

> The Supreme Court held, in Jefferson vs. Board of Education, 35 Vr. 59, and Van Buren vs. Albertson, 25 Vr. 73, that a dispute as to membership in a Board of Education was a controversy arising under the School Law, and within the jurisdiction of the Commissioner.[133]

In certain cases, the local boards themselves have attempted to rule upon eligibility to membership, or to prevent persons from qualifying as members on account of alleged ineligibility. Local boards have no such power:

> (a) [A local board of education] cannot pass upon the eligibility of a member.[134]

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[132] Stoothoff v. Davies (In *MSS.*), decision of Com. of Ed., May 29, 1930, reversed as to other considerations by Supreme Court.

[133] Lasher et al. v. Board of Education of Township of Weehawken, S. L. D., p. 18, decision of Com. of Ed., Jan. 29, 1914, affirmed by St. Bd., May 2, 1914.

[134] In the Matter of the Application of the Weymouth Township Board of Education, S. L. D., p. 22, decision of Com. of Ed., Feb. 17, 1915.

> (b) While a member of the board can raise a question about the qualification of any of the members, so that parties dealing with the board may have knowledge of the questionable title to office of such member a board of education has no legal right to rule upon the filing of the oath of office [*i.e.*, to object to or prevent its being filed].[135]

Although the usual appeal in case of dispute concerning title to the office of school director is to the Commissioner, the Supreme Court has ruled that resort may be had directly to that body by *quo warranto* proceedings:

> There is a reason why the court should permit the issue of a *quo warranto* without waiting for the determination of the double appeal to the Commissioner of Education and to the State Board. The action of the Commissioner and the Board cannot be either final or effective. It cannot be final, since neither the relator nor the defendant can be deprived of the right to submit the question to a jury if the pleadings are so framed as to present an issue of fact. It cannot be effective since the State Board cannot oust the incumbent of a public office. They pass on the question only for immediate purposes. Buren v. Albertson, 54 N. J. Law, 73, 22 Atl. 1083. In that case Justice Dixon likened the proceedings to proceedings in a contested election under the Elections Act, which are a mere supplement to the election machinery and do not and cannot constitutionally oust the jurisdiction of this court by *quo warranto.* Conger v. Convery, 52 N. J. Law, 417, 20 Atl. 166. I think it clear that, where so important a question as the title of members of a school board to their office is involved, a proper exercise of discretion permits, if it does not require, the speedy adoption of the only final and effective procedure to determine the question.[136]

The court has made it clear that in case of resort to the Supreme Court, *Quo Warranto,* and not *Certiorari* is the appropriate proceeding to determine title to office, upon which the incumbent has entered.[137] However,

> * * * where one is in the possession and occupancy of an office, and municipal action has been taken to oust him or interfere with his right thereto, *certiorari* is the proper method of reviewing such action. (Moore v. Bradley Beach, 87 N. J. L. 391; Murphy v. Hudson County, 92 Id. 244; O'Neill v. Bayonne, 2 N. J. Adv. R. 645).[138]

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[135] In re Organization of the Matawan Township Board of Education (In *MSS.*), decision of Com. of Ed., May 29, 1930.

[136] Koven v. Stanley, 87 A. 89.

[137] Du Four v. State Superintendent, 72 N. J. L. (43 Vr.) 371, 61 A. 258; and Diebert v. South Amboy, 1 N. J. Misc. Rep. 543.

[138] State v. Costello, 2 N. J. Misc. Rep. 961.

5. *De facto* membership and *de facto* boards.

(a) Definition.

For an adequate definition of *de facto* officer, it is well to go back to that English jurist's statement, quoted in Oliver v. Jersey City:

> Lord Ellenborough, in 1805, in Rex vs. Bedford Level, 6 East 356, said: "An officer *de facto* is one who has a reputation of being an officer, who assumes to be and yet is not a good officer in point of law." This definition has never been questioned, and all those given by the textbook writers since are little more than variations of this one.[139]

(b) How a board member or a board acquires *de facto* status.

It is evident that acting as such, causes a presumption in favor of such person or board:

> The fact that an officer acted as a school trustee is sufficient evidence of his official character.[140]

(1) *De facto* status may be the result of an illegal or invalid election or appointment:

> An office is deemed to be full *de facto* whenever a person elected has been admitted to it, notwithstanding the election may, upon legal grounds, turn out to be invalid; provided such election is consistent with an honest misapprehension of the law, and not evidence of a palpable disregard of its provisions.[141]
>
> When an official person or body has apparent authority to appoint to a public office and apparently exercises such authority, and the person so appointed enters upon such office, and performs its duties, his official acts will be valid with respect to the public and to third persons with whom he deals officially, and he will be an officer *de facto*, notwithstanding there was a want of power to appoint in the body or person who professed to do so.[142]

(2) *De facto* status may be acquired when, after appointment or election, the act under which they were so elected or appointed is declared unconsti-

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[139] Oliver v. Jersey City, 63 N. J. L. 634.

[140] Gilbert v. Patterson, 32 N. J. L. (3 Vr.) 177.

[141] Leeds v. Atlantic City, 52 N. J. L. (23 Vr.) 332, 19 A. 780.

[142] Erwin v. Jersey City, 60 N. J. L. (31 Vr.) 141, 37 A. 732.

tutional, provided they have actually assumed the duties of the office.

> A municipal government which is organized under an act of the legislature, which is subsequently adjudged to be unconstitutional, is a government *de facto,* and its officers are officers *de facto,* and its authority must prevail and be respected until the attorney-general interposes by *quo warranto,* and secures the actual ouster and removal of the incumbents in office.[143]
>
> The members of the Board of Education were appointed under the provisions of Chapter 233, P. L. 1911. This law was declared to be unconstitutional in the case of Sheridan vs. Lankering, 83 A. R. 641, but no action has been taken to remove said members and until they have been removed by due process of law they continue to act as *de facto* members and their acts are legal.[144]

(3) One who, while holding one office, is properly elected to a second office which is incompatible with the first, but who continues in good faith to exercise the duties of the first office, is an officer *de facto*:

> An officer legally elected and qualified, who enters upon the duties of his office, and afterwards is appointed to and accepts another office, but in good faith continues to publicly discharge the duties of the first, his term not having expired, and no successor having been appointed or elected in his stead, nor any adjudication made against his title is an officer *de facto.*[145]

(4) Loss of residence while a board member, does not deprive the incumbent of his right to serve as a *de facto* member:

> A member of a board of education must not only be a resident of the district at the time of his election, but must continue to be a resident during the term for which

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[143] State ex rel. Attorney-General v. Dover Township, 62 N. J. L. (33 Vr.) 138, 41 A. 98.

[144] Board of Education of City of Lambertville v. Common Council of City of Lambertville, S. L. D., p. 51, decision of Com. of Ed., Apr. 8, 1913, affirmed by St. Bd., July 10, 1913, affirmed by Supreme Court, 9 A. 242, reversed by Court of Errors and Appeals.

[145] Judgment, 63 N. J. L. (34 Vr.) 96, 42 A. 782, reversed. State, Oliver, pros. v. Jersey City, 63 N. J. L. (34 Vr.) 634, 44 A. 709.

> he was elected. If he loses his residence he ceases to be a *de jure* member, but continues as a *de facto* member until his office has been declared vacant in the manner provided by law.[146]

(5) In spite of failure to take the oath of office, an officer may still become an officer *de facto*:

> Failure of an officer to take the prescribed oath of office will not prevent his becoming an officer *de facto*.[147]

(6) Inability to qualify as a *de jure* member, does not debar a person from acting as a *de facto* member:

> Even if Mrs. Davies was not at the time of organization a *de jure* member of the board as is held by the Commissioner [due to alleged inability to qualify], she was a *de facto* member of the board and as such she had reasonable color of title and a right to participate in the conduct of the business of the board.[148]

(c) Validity of acts of *de facto* boards or officers.

The principle which may be regarded as fundamental on this point is brought out in the following decision:

> A *de facto* officer of a corporation being one who exercises the duties of the office under a color of right, and not a mere usurper, his acts are valid in so far as the rights of the public or third persons are concerned.[149]

A *de facto* board may appoint persons to serve as its officers and to be responsible to it, but such persons do not thus become *de jure* officers:

> A *de facto* board cannot create a *de jure* officer.[150]

Such appointed persons become *de facto* officers and are entitled to recognition as such:

> The principles upon which the acts of *de facto* officers are held valid require the recognition of appointments to office

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[146] O'Brien v. Board of Education of Town of West New York. See footnote 127 *supra*.

[147] Rosell v. Neptune. See footnote 130 *supra*.

[148] In re Organization of Matawan Township Board of Education. See footnote 135 *supra*.

[149] State ex rel. Mitchell v. Tolan, 33 N. J. L. (4 Vr.) 195. See also Oliver v. Jersey City. See footnote 139 *supra*.

[150] Jersey City v. Erwin, 59 N. J. L. (30 Vr.) 282, 35 A. 948.

made by them, when such appointments would be valid, if made by officers *de jure*.[151]

(d) Protection in office of *de facto* officers or board members.

If in the supposition that *de facto* boards or officers are illegally holding their positions, the appointing authority appoints others in their place, the *de facto* officers are not by such action disturbed in their positions, since only the court can try title to office:

> The status of a *de facto* board of education, composed of persons actually elected as school trustees at a school meeting, will not be destroyed by the action of the county superintendent in appointing other trustees upon the supposition that the election was illegally conducted.[152]
>
> A *de facto* member of a board * * * [is] entitled to hold the position until removed in the manner provided by law.[153]

6. Eligibility of board members for offices filled by board.

The following decisions are self-explanatory:

> The act (Rev. Sup., p. 507) provides that no member of any board of aldermen, township committee or other municipal board or body, shall, during the term for which he shall have been elected such member, be eligible for election or appointment to any office to be filled by such board. Held, that the general words ''other municipal boards,'' following the particular designation of certain bodies, included all bodies or boards having municipal governmental functions, whether legislative or administrative, and so included the board of education of Bayonne.[154]
>
> The purpose of P. L. 1885, p. 178; C. S. 3478, was to prevent a member of a municipal body from using his power to get an office which was required to be filled by that body, and the act comprehends all municipal bodies carrying on the functions of government without regard to whether they be *de facto* or *de jure* bodies.[155]

It is obvious that an exception to the principle declared in the above decision is the position of secretary or district clerk, which board members are specifically permitted to hold.

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[151] Brinkerhoff v. Jersey City, 64 N. J. L. (35 Vr.) 225, 46 A. 170. See also Richman v. Adams, 59 N. J. L. (30 Vr.) 280, 36 A. 699.

[152] Kimball v. Hendee, 57 N. J. L. (28 Vr.) 307.

[153] In the Matter of the Application of the Weymouth Township Board of Education. See footnote 134 *supra.*

[154] State ex rel. Doyle v. Board of Education, 54 N. J. L. (25 Vr.) 313, 23 A. 670.

[155] Roberts v. Burlington County Board, 37 N. J. L. 272 (Burlington Co. Circuit Court).

7. Vacancies in the board of education and its offices.

Under the school law, vacancies in Article VII school boards are of two types,—those caused by failure to elect, and those due to other causes. Such causes are—(a) resignation; (b) death; (c) removal from membership by court owing to disqualification due to change in residence, malfeasance in office, etc.; (d) division of a school district causing a loss of members in the original district. In Article VI school boards there is no legal necessity to classify the conditions which cause vacancies to exist, since all vacancies are filled by the Mayor or other chief executive officer of the municipality.[156] In line with the decision in Ferris et al. v. O'Keefe et al. previously quoted,[157] this power is held by the court in a commission governed city to belong not to the Commissioner but to the Mayor or other chief executive officer.

It has in some cases happened that in Article VI districts the members of the board of education attempted to assume the power granted to Article VII boards of filling vacancies in the board. This right was denied them not only by law, but by the decision of the Commissioner:

> If a vacancy existed in the Board, it could only be filled by appointment by the Mayor; the Board of Education was without power in the premises.[158]

In city school districts, where the Mayor appoints the members of the board, it has been held that

> * * * the illegal appointment to public office vests in the appointee no valid title thereto, and, where the incumbent is not legally qualified to hold office, a vacancy exists therein.[159]

In Article VII districts, all vacancies caused by failure to elect members are to be filled by the County Superintendent, such persons to serve until the next election for members.[160] In all other cases, the board itself fills the vacancies by appointment of qualified persons, to serve until the next election for board members, when the voters fill the vacancies permanently, for the unexpired term.[161]

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[156] Code, Secs. 51, 54.

[157] See footnote 124 *supra.*

[158] Leuly et al. v. Ritter et al., S. L. D., p. 37, decision of Com. of Ed., Feb. 24, 1914, affirmed by St. Bd., May 3, 1914.

[159] Board of Education of Newark v. Civil Service Commission, 99 N. J. L. 106.

In some cases it has been necessary to resort to litigation to determine whether there was a failure to elect. Many elections have resulted in tie votes for candidates, and this is ruled to be a failure to elect.[162] In another case a person was elected who had not been a citizen for the required three-year period at the time membership would be assumed. The Commissioner ruled:

> The Commissioner cannot agree with the argument of counsel for appellant, that upon the failure of [the one so elected] to qualify [the one receiving the next highest number of votes] is legally entitled to the office. A citizen was elected, who could at least qualify as a *de facto* member of the board. His failure to qualify will make a vacancy in the Board. It was not a failure on the part of the voters to elect. * * * A vacancy legally exists in the membership of the board which it [the Board] is authorized (Section 68, P. L. 1903, s. s.) to fill provided *quo warranto* proceedings are not first made necessary by an attempt of respondent to qualify.[163]

In another case the Commissioner ruled that where a petition of a candidate to have his name placed upon the ballot was improperly sworn, the name was illegally placed upon the ballot, and the resulting election was invalid, thus causing a failure to elect, in which case the County Superintendent was instructed to fill the vacancy.[164]

As was indicated in the opinion of Kimball v. Baxter, quoted just previously, candidates who stand next highest on the ballot have at times believed that the disqualification of the person receiving the highest number of votes would result in themselves being declared elected. This could not be the case, however, since a vacancy is never to be filled in that manner; nor could that occur when a board member is removed after election:

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[160] Code, Sec. 36 (IV).

[161] Code, Secs. 116, 127 (I).

[162] In the Matter of the Recount of Ballots cast at the Annual Election in the Township of Lebanon, Hunterdon Co., State School Report, 1929, p. 94, decision of Com. of Ed., Mar. 6, 1929.

[163] Kimball v. Baxter (In *MSS.*), decision of Com. of Ed., Apr. 2, 1931.

[164] In the Matter of the Review of the Annual School Election in the Borough of Union Beach, Monmouth Co., State School Report, 1929, p. 95, decision of Com. of Ed., Apr. 19, 1929.

> [The removal of a board member] could not possibly result in making a member of the Board a person who had been defeated by the people at the annual election.[165]

One of the causes for vacancies mentioned above was the division of a school district. This is illustrated in the following decision:

> When a portion of a district becomes a new district or a portion of another district, the members residing in the section set off cease to be residents of the district and vacancies thus created are filled by residents of the remaining territory and thereafter the section which was set off is not represented on the Board.[166]

It is assumed that by this is meant that the vacancy for the unexpired terms would be filled at the next regular election by vote of the people. The vacancies until the election evidently could be filled by the members of the board, if the original district operated under Article VII.

The law provides also for the filling of vacancies in the offices of the board in the case of Article VII districts. In such districts, the board elects its own officers and in case the office of president or vice-president becomes vacant, has authority to fill it. Failure to do so within thirty days after the vacancy occurs, however, gives to the county superintendent the power of filling the vacancies for the unexpired term.[167]

8. Terms of office.

The legal provisions concerning term of office for board members in the different types of districts are set forth in Table I. A number of questions which have arisen concerning the interpretation of the expression "term of office," however, should probably be noted. When used generally, the expression usually refers to the statutory period, but as applied to a particular board member, it may have a different signification:

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[165] In the Matter of the Application of the Weymouth Township Board of Education. See footnote 134 *supra.*

[166] Upper Deerfield Township Board of Education v. Deerfield Township Board of Education, S. L. D., p. 281, decision of Com. of Ed., Dec. 7, 1926.

[167] Code, Sec. 126.

> The words ''term of office'' may indicate the statutory period for which an officer is elected; but the words may also mean a period shorter than that for which the particular officer was elected, as his ''term of office'' may be terminated before the expiration of the statutory period by impeachment, resignation, or death.[168]

The term of a regularly elected or appointed board member begins on the day the term of his predecessor in office expires. In Article VI boards, this is the date of organization of the new board, which is required to be on the first day in February annually, or on the following day, if the first falls on Sunday.[169] In the case of Article VII boards, however, the day on which the new board organizes may not be the beginning of the term of a new member, since the board

> * * * shall organize annually on or before the first Monday in April, or on such other day as said board may agree upon prior to the first Monday in April, by the election of one of its members as president and another as vice-president.[170]

This option to organize before the first Monday in April has led to some confusion in the minds of board members of Article VII districts, as to the exact date on which their terms begin. The ruling of the Commissioner on this point was:

> Members [of a board] who are elected for the full term take office on the first Monday in April. While they may meet to organize before that date, their terms begin the first Monday in April, which is the end of the terms of their predecessors in office.[171]

If in an Article VI district the Mayor fails to appoint the successor in office of a board member, or if in an Article VII district there is a failure to elect a successor, the term of the member is not thereby extended:

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[168] Board of Chosen Freeholders of Atlantic County v. Lee, 70 A. 925, 76 N. J. L. 327, judgment affirmed, 76 A. 1118, 77 N. J. L. 799.

[169] Code, Sec. 52.

[170] Code, Sec. 126.

[171] Kimball v. Baxter (In *MSS.*), decision of Com. of Ed., Apr. 2, 1931.

> There is nothing in the School Law nor in Chapter 49 of the Laws of 1892 which extends, until his successor has been appointed, the term of office of a board of education whose term has expired.[172]

9. Resignation of a board member.

When a board member resigns, such resignation to be effective must be accepted:

> An officer in a public corporation connected with local jurisdiction cannot, at his pleasure, lay aside his office. His resignation, to make the office vacant, must be accepted by competent authority.[173]

This decision naturally brings up the question as to who is competent to receive the resignation of a board member. The principle to be observed here is made clear in the following:

> It is not * * * to the appointing power * * * that, according to the rule, the power of accepting the resignation is committed; such power is entrusted to the body or officer authorized to fill the vacancy.[174]

It is obvious therefore that in an Article VII district, resignations of board members must be made to the board of education and accepted by it, since that body is authorized to fill the vacancy until the annual election. The one exception to this principle is found in incorporated towns having a population of 10,000 or over in which either by earlier legislation or by option under P. L. 1929, Chapter 280, the board members are appointed by the Mayor or other chief executive officer. In such districts, and in all Article VI districts, resignations of board members must be made to the Mayor or other chief executive officer of the municipality, and be accepted by him. In such a district a resignation presented to the board of education and accepted by it would be incomplete and invalid.

If a board member sends in his resignation, and at a later date withdraws it before it is accepted by competent authority, he retains his membership:

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[172] In the Matter of the Application of Wilson Taylor to Review Certain Proceedings of the Mayor of the City of Hoboken, State School Report, 1912, p. 117, decision of Com. of Ed., Aug. 22, 1912.

[173] State v. Ferguson, 31 N. J. L. (2 Vr.) 107. See also Townsend v. School Trustees, 41 N. J. L. (12 Vr.) 312 (1879).

[174] Fryer v. Norton, 67 N. J. L. (38 Vr.) 23. See also State ex rel. Reeves v. Ferguson, 31 N. J. L. (2 Vr.) 107, 129.

> In the Commissioner's opinion it therefore follows that since a resignation of a public office, whether prospective or unconditional, must in New Jersey be accepted by the proper authority before it can be considered complete, such resignation is capable of being withdrawn at any time before actual acceptance.[175]

If the resignation has been presented to the proper authority and has been accepted, however, it cannot be withdrawn:

> The resignation of a public officer, to take effect at a future day named, when accepted by competent authority, is valid and binding, and will take effect according to its terms.[176]

If the Mayor of a city or other Article VI district attempts to control the activities of his school board appointees by requiring them to give him at the time of such appointment an undated resignation, such resignation will not be recognized as valid if acted upon by the Mayor:

> It is the opinion of the Commissioner of Education that the securing by the Mayor of Secaucus of an undated resignation from Julia Andes, one of the members, in advance of her reappointment on February 1, 1927, and the subsequent acceptance of such resignation by the Mayor in November of that year, did not constitute any real vacancy on the board of education which the Mayor had any legal authority to fill by * * * appointment.[177]

If a citizen properly qualified is appointed or elected a member of a board of education, he cannot refuse to accept, under penalty:

> It is a doctrine of the common law that every citizen in peace, as well as in war, owes his services to the state when they are required, and persons are liable to indictment if they refuse to take the oath and qualify themselves as public officers after having been regularly elected or duly appointed. * * * Mandamus will lie to compel one who has been duly elected to a municipal office to accept and serve in the same.[178]

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[175] In the Matter of the Petition of Percy G. Meerbolt to be seated as a Member of the Board of Education of the Town of Secaucus. State School Report, 1928, p. 97, decision of Com. of Ed., June 15, 1928.

[176] State ex rel. Whitney v. Van Buskirk, 40 N. J. L. (11 Vr.) 463.

[177] In the Matter of the Petition of Charles F. Gasser to be seated as a Member of the Board of Education of the Town of Secaucus, State School Report, 1928, p. 99, decision of Com. of Ed., June 15, 1928.

[178] Appeal of J. C. Myers, in re Vacancy in Board of Education of Oxford Township, Warren Co., S. L. D., p. 34, decision of Com. of Ed.,

> Upon general principles of law as contained in judicial decisions of the highest authority, the refusal of an office in a public corporation connected with local jurisdiction is an offense punishable by a proceeding in behalf of the public.[179]

In the appeal of Myers previously quoted, it happened that the person elected had not desired to be a candidate and refused to qualify by taking the oath of office. This was held by the Commissioner and the State Board to be immaterial to the real issue:

> From such authorities, it is clear that the taking of the oath of office is no part of the election. Unless the school meeting at which Mr. Frome was elected was not conducted in accordance with law, or unless he could point to some statute or judicial authority which would relieve him from the necessity of accepting the office, it seems as though the Oxford Township school district had the right, if it so desired, to compel him to accept.[178]

Neither could such a person when elected accept membership and immediately thereafter resign:

> To refuse an office in a public corporation connected with local jurisdiction, was a common law offense and punishable by indictment. * * * Regarding then this doctrine of the law as established, it seems to be an unavoidable sequence that the party elected, and who is thus compelled by force of the sanctions of the criminal law to accept the office, cannot afterwards resign it *ex mero motu.* If this recusancy to accept can be punished, it cannot be that he can accept and immediately afterwards, at his pleasure, lay down the office.[180]

10. Removal of members of boards of education.

There are three possible ways by which a board member may be removed through legal action from office.

(a) Removal by the board of education itself for absence from three consecutive regular meetings of the board without good cause.[181]

The power of the board over removal of its own members is limited to the instance named, that involving absence from meetings:

July 24, 1912, affirmed by St. Bd., August, 1912. (Quotation from 15 Cyc. 393.)

[179] State v. Ferguson. See footnote 173 *supra.*

[180] State ex rel. Whitney v. Van Buskirk. See footnote 176 *supra.*

[181] Code, Secs. 57, 136.

> The School Law gives to a local board of education power to remove a member who fails to attend three consecutive regular meetings of the Board without good cause. It cannot pass upon the eligibility of a member, nor remove him for any cause other than that stated.[182]

It cannot, for instance, remove a board member from office because it claims that he has lost his residence in the district:

> If he [the board member] loses his residence he ceases to be a *de jure* member, but continues as a *de facto* member until his office has been declared vacant in the manner provided by law. * * * The question as to whether or not a member of a board of education has ceased to possess the qualifications prescribed by law for membership in the board is a controversy arising under the School Law and the Board of Education of the Town of West New York had no power to decide such a controversy.[183]

In case a board of education desires for proper reason to remove a member from office, it is necessary under most circumstances to serve him with notice and accord him a hearing:

> It is not clear that the Board of Education of the Town of West New York could oust Mr. O'Brien from membership without giving notice, and affording him an opportunity to be heard, or that it had any authority whatever to determine that he abandoned his office, except for a failure to attend three consecutive regular meetings without good cause.[183]

It is to be noted however that under certain conditions the notice and hearing are not essential in proceedings for removal:

> If a member of a board of education is absent from the district for a long period of time consecutively, and absent from the State, so that it is impossible to notify him, I think that notice would not be necessary. But where a man is living in the district, and can be served with a notice, notice should

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[182] In the Matter of the Application of the Weymouth Township Board of Education. See footnote 134 *supra.*

[183] O'Brien v. Board of Education of Town of West New York. See footnote 127 *supra.* See also State, Markley pros. v. Cape May Point, 55 N. J. L. (26 Vr.) 104, 25 A. 259.

> be given for the reason that the Board must be able to show that the member is removed for cause.[184]

In one case before the Commissioner, a board member had been absent for a prolonged period in Europe on business, and the board attempted to remove him from membership by charging that he had been absent from three consecutive regular meetings without good cause. The Commissioner ruled, however, that absence for this reason was justifiable, and hence not good cause for removal.[185]

In another case, a board attempted to remove from office a member, and he in turn pleaded that he had been absent for good cause since he had been confined in jail. The Commissioner ruled that this was not good cause for absence under the law:

> It is a well-known legal maxim that no man may take advantage of his own wrong and that no man may set up his own iniquity as a defense. It is the opinion of the Commissioner of Education that to allow confinement in jail as a result of conviction of crime to be considered good cause for absence from a board of education meeting would be to allow a man to take advantage of his wrong clearly within the meaning of the maxim referred to.[186]

(b) A second type of removal is that of a *de facto* board member from office by the court on *quo warranto* on the basis of ineligibility.

> The right to remove from office and thereby declare a position vacant rests in the Supreme Court under *quo warranto* proceedings. The Commissioner in line with decisions cited may rule upon the eligibility of a person to hold an office created under the School Law.[187]

A writ of *quo warranto* to force the ouster of a *de facto* board is issued at the instance of the attorney-general.[188] It cannot be issued to a private citizen:

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[184] Mead v. Board of Education of Pequannock Township, S. L. D., p. 34, decision of Com. of Ed., Apr. 7, 1913.

[185] Kakosh v. Midland Township Board of Education (In *MSS.*), decision of Com. of Ed., Oct. 2, 1923.

[186] Pielis v. Board of Education of Jefferson Township (In *MSS.*), decision of Com. of Ed., Aug. 2, 1922.

[187] Stoothoff v. Davies. See footnote 132 *supra.*

[188] State ex rel. Attorney-General v. Dover Township. See footnote 143 *supra.*

> Members of a *de facto* board of education of a city, organized under the general school law (Pamph. L., 1902, p. 69), cannot be ousted at the instance of a private relator in *quo warranto* on the ground that such board of education has no legal corporate existence.[189]

Concerning the removal of a president or a vice-president of a board from his office, but not from membership, the Code has provided that an Article VII board may do so, in case such officer "refuses to perform any duty imposed upon him by this act," but such action must be by a majority vote of all the members of the board.[190] No reference is found to any similar power lodged in Article VI boards. In one instance, a board attempted to remove its president for refusing to sign orders for payment of expenses, because there was not sufficient money on hand to pay the orders. The Commissioner ruled that a board could not remove its president for refusing to do something which was illegal. In the same case the action was attempted at a special meeting not called for that purpose, from which the president was absent, and without his knowledge that his removal as president was contemplated, and without the opportunity to defend himself against the charges. The decision stated:

> The Commissioner is * * * of the opinion that to remove a man from office without giving him an opportunity to meet the charges against him is contrary to all usage and fairness in such matters.[191]

As a result, the president was ordered reinstated.

(c) A third type of removal is that ordered by the court upon conviction following indictment for criminal offense or malfeasance in office.[192]

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[189] Holloway v. Dickinson, 69 N. J. L. (40 Vr.) 72, 54 A. 529.

[190] Code, Sec. 126.

[191] Williamson v. Board of Education of Union Township, Hunterdon Co., S. L. D., p. 32, decision of Com. of Ed., Nov. 18, 1920.

[192] Code, Sec. 684.

D. The Meetings of the Board of Education

1. Regular and special meetings.

Meetings of a board of education may be either regular or special. It is assumed that by a regular meeting is meant one occurring at a customary or fixed time and place at which any business may be transacted which is within the jurisdiction of the board. By a special meeting it is assumed is meant a meeting called for a special purpose and not for general business, and at which only that business may be transacted for which the meeting was called.

There is no specific provision in the school law concerning regular or special meetings in Article VI districts. Presumably it is within the power of the board to make rules, regulations, and by-laws concerning such meetings, since the law provides that any

> * * * such board shall make, amend and repeal rules, regulations and by-laws not inconsistent with this act or with the rules and regulations of the State Board of Education, for its own government, for the transaction of business * * *.[193]

In respect to boards in Article VII districts, the law provides that they shall meet at least once in two months.[194] It recognizes the existence of both regular and special meetings by providing that the district clerk shall notify all members of the board of education of all regular and special meetings of the board.[195] It is a matter of conjecture whether the school tribunals or the courts, in the absence of direct legislation on this point concerning Article VI boards, would interpret these requirements as to meetings of Article VII boards as applying to the Article VI boards as well. No decisions or opinions on this point have been found.

It would seem that the notice of a special meeting of the board must be given to members of the board in Article VI districts as well as in Article VII districts, since the following case concerned one of the former type:

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[193] Code, Sec. 65 A.
[194] Code, Sec. 133.
[195] Code, Sec. 135.

> It is well settled that when a special meeting of a municipal board is called, each member must have notice of the time and place of the meeting, and the purpose for which it is called. It is not necessary that notice be sent to the members of a board of the time and place of a regular meeting for the reasons that the members of a board are presumed to know the time and place where a regular meeting will be held, and it is their duty to attend without formal notice.[196]

It is doubtful, however, whether a regular meeting of the board of an Article VII district of which the members had not been notified by the district clerk, would be legal, in view of the provisions of Section 135 of the Code, previously cited.

It is to be noted that the law does not specify the manner in which notice shall be given; it would seem that oral notice is just as legal as is written notice:

> A special meeting of a board is not legal unless all the members have had notice of the time, place and purpose of the meeting, but the law does not state how such notice shall be given.[197]

The above quotation referred specifically to a Board of School Estimate, but is couched in such terms that it would seem to apply equally well to a board of education.

A board member may waive his right of notice to a special meeting.[198] If he has failed to receive notice or there was some defect in the notice, his presence at the meeting will overcome this:

> All the authorities hold that any defect in the notices calling a meeting of the directors of a municipal corporation is cured by the attendance at such meeting of all the members of the board, since all may then be presumed to have been legally notified.[199]

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[196] Leuly et al. v. Ritter et al., S. L. D., p. 40, decision of Com. of Ed., Feb. 26, 1914, affirmed by St. Bd., May 3, 1914.

[197] Board of Education of City of Lambertville v. Common Council of City of Lambertville, S. L. D., p. 51, decision of Com. of Ed., Apr. 8, 1913, affirmed by St. Bd., July 10, 1913, affirmed by Supreme Court (9 A. 242), reversed by Court of Errors and Appeals.

[198] Frederick v. Board of Education of Township of West Milford (In *MSS.*), decision of Com. of Ed., Oct. 2, 1922.

[199] Hulmes et al. v. Board of Education of Jefferson Township, State School Report, 1924, p. 239, decision of Com. of Ed., Nov. 19, 1923.

2. Time of holding board meetings.

The law requires that meetings of boards of education shall commence not later than eight o'clock P. M.[200] This requirement has resulted in bringing into controversy the legality of proceedings in a number of cases. In one case a board of education met at four o'clock in the afternoon and adjourned to 8.15 P. M. In terming this second meeting illegal, the State Board decision said:

> If a board can convene at four and then lawfully take a recess until 8.15, there would seem to be no reason why it could not do so until 9.15, 10.15, 11.15, or even midnight, and the spirit, if not the letter, of the law would be just as clearly broken if a meeting was called for any such hours. The law is very clear. Meetings of the Board of Education shall be public, and shall commence not later than 8 P. M. The object of the law, viz., full publicity, can be defeated almost as well by holding meetings when the great majority of the public is asleep as by a star-chamber proceeding.[201]

While this decision construed the law strictly, others have been more lenient, even when business as important as bonding proceedings were involved:

> The validity of board of education meetings at which bonding proceedings have been initiated has been sustained when such meetings were opened shortly after eight o'clock. * * * Since no one was shown by the testimony to have left the meeting, which commenced shortly after eight o'clock P. M., there was in the Commissioner's opinion a substantial compliance with the law in that respect.[199]

3. Official records or minutes of the board of education.

The secretary in Article VI districts, and the district clerk in Article VII districts, is required to keep the record of all proceedings of the board, and in the former districts, of the committees of the board as well.[202] The board, however, is the judge as to what are official proceedings, beyond the record of actions taken:

> It is the opinion of the Commissioner of Education that [a board of education] has full power to decide what shall be included in the

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[200] Code, Sec. 1.

[201] O'Brien v. Board of Education of Town of West New York. See footnote [127] *supra.*

[202] Code, Secs. 73, 135.

> minutes in excess of a record of action taken or things done by the board, and it [acts] within its authority in refusing to record * * * resolutions [presented by an individual member of the board and not seconded].[203]

The record of proceedings of the board as kept in its minute book is naturally of immense importance, in case of legal action in which the board may be involved, but is not necessarily irrefutable evidence:

> The book of minutes kept by school trustees may be received, but is not conclusive, and may be overcome by parol.[204]

4. The conduct of business by the board of education.

Boards of Education cannot begin the transaction of business prior to organization, which for Article VI boards is on the first day of February, or if that date falls on Sunday, then on the following day, and for Article VII boards is on the first Monday in April:

> It has been held by this department that while a new board of education may organize before April 1st, it cannot legally meet for the transaction of any business before the first Monday in April.[205]

Nor can the official business of the board be transacted elsewhere than in its meetings or as a result of action in its meetings:

> The affairs of a corporate body can only be transacted at a corporate meeting.[206]

The board in its actions or business transacted must keep within the powers entrusted to it by law:

> Where public bodies are entrusted, by statute, with powers of a general nature, it must appear from an inspection of all their proceedings, when properly before the court, that they have kept strictly within their limited sphere.[207]

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[203] Levine v. Board of Education of City of Bayonne and Sklenar, State School Report, 1928, p. 69, decision of Com. of Ed., Mar. 2, 1928.

[204] State v. Van Winkle, 1 Dutch. 73.

[205] Davies et al. v. Glen Gardner Board of Education (In *MSS.*), decision of Com. of Ed., Aug. 24, 1922.

[206] Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Gr.) 143; Dey v. Jersey City, 19 N. J. Eq. (4 C. E. Gr.) 412; Johnston v. Jones, 23 N. E. Eq. (8 C. E. Gr.) 216.

[207] State, Wilkinson v. Trenton, 35 N. J. L. (6 Vr.) 485, affirmed in 36 N. J. L. (7 Vr.) 499.

For managing its affairs and for transacting its business the board is instructed to make rules and regulations.[208] Frequently boards adopt certain standard sets of rules, such as Cushing's Manual, or Roberts' Rules of Order as a part of such rules and regulations. In some such bodies of rules it is stipulated that the rules of order or of parliamentary procedure, or the rules of the board itself can be suspended or altered only by a unanimous vote of the board. It has been held by the Commissioner, however, that a majority vote of those present and constituting a quorum is sufficient to suspend the rules, since this is all that is required by the school law.[209]

During the progress of the board meeting, a recess may be taken at the discretion of the board, or under rules which it has established. When this is done, however, it must be taken in such a manner as to give full information to all members of the time and place of reconvening:

> The authorities * * * indicate that a recess, if it is to result in a continuation of the session, must always be taken to a definite time and place provided for either in the resolution declaring the recess or in the by-laws or rules of the body itself. Were the practice to be otherwise, it would always be possible for a majority of the members of a public body to compel the taking of an indefinite recess and then after continuing such recess until the minority had been forced to disperse, proceed to reconvene and transact business unhampered by the presence of such minority. Such procedure is clearly subversive not only of all justice and equity but of accepted rules of Parliamentary Procedure as well.[210]

In this case, the board had taken a recess at 9.45 P. M. without indicating any time or place for reconvening. Five members left the building, but the other four remained until 1.30 A. M., then left for their homes. At 5.30 A. M. the majority members returned and conducted business which they would have difficulty in transacting with the full board present. This business the Commissioner declared to be null and void. He further expressed the opinion that when an indefinite recess is taken, it is equivalent to adjoining *sine die,* and notice of the reconvened meeting must be given to all members as required by law.

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[208] Code, Secs. 65 A. 127 (III).

[209] Noonan and Arnot v. Board of Education of Paterson, S. L. D., p. 116, decision of Com. of Ed., Jan. 7, 1925, affirmed by St. Bd.

[210] Cotton et al. v. Board of Education of Borough of Brooklawn, Camden Co., State School Report, 1927, p. 82, decision of Com. of Ed., Jan. 13, 1927.

A situation somewhat similar to the one just discussed is illustrated in Frederick v. West Milford.[211] In this case the board adjourned its meeting, and reconvened a few minutes later, in order to reconsider certain action taken during the earlier meeting. The Commissioner here ruled likewise that if a board adjourns its meeting, and reconvenes later in the same evening, even if only a few minutes later, the second session is a special meeting, and therefore is not legal unless all members have notice, or waive the right of notice. If even one member is absent at the time of the call of the second session and is not notified of the special meeting, such meeting is illegal and all business transacted at such meeting is void.

As to an adjourned or continued meeting:

> A meeting which has been adjourned to another date cannot in the opinion of the Commissioner be said to have been completed until the conclusion of the adjourned meeting.[212]

In the matter of passing motions or resolutions, some require only a majority vote of those present and constituting a quorum, while others require a majority vote of all the members of the board, or a two-thirds majority vote of the full membership.

The following actions require a majority vote of all members of the board in both Article VI and Article VII districts:

(a) appointing or removing the secretary or district clerk;[213]

(b) to appoint, dismiss, or transfer principals or teachers, or fix their salaries;[214]

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[211] Frederick v. Board of Education of Township of West Milford. See footnote 198 *supra.*

[212] Kakosh v. Midland Township Board of Education. See footnote 185 *supra.*

[213] Code, Secs. 70, 71, 135.

[214] Code, Secs. 89, 132.

(c) to determine school term;[214]
(d) to adopt or alter courses of study;[214]
(e) to select textbooks;[214]
(f) to fix consideration for conveyance and transfer of municipal property to school district for erection of school building;[215]
(g) to exchange or dispose of any lands when not needed for school purposes.[216]

In Article VI districts the following actions likewise require a majority vote of the full membership:

(a) to appoint or remove a superintendent of schools;[217]
(b) to remove assistant superintendents of schools;[218]
(c) to appoint or remove a business manager;[219]
(d) to restore to service an assistant superintendent, a principal, or teacher suspended by the superintendent;[220]
(e) to return to the auditor for approval and payment a claim or bill returned to the board by the auditor for correction or reconsideration.[221]

In Article VII districts, a majority vote of the full membership is needed furthermore to remove from office—not from membership on the board—the president or the vice-president of the board.[222]

In addition to these cases which require a majority vote of all the members of the board, several other actions require a two-thirds majority of the full membership.

(a) in any district composed of two or more municipalities, to change the name of the district;[223]
(b) in any district composed of two or more municipalities and having a population of 10,000, and operating under the provisions of Article VII, to buy land, build school, or purchase equipment;[224]
(c) in any township school district, to transfer to the governing body of the municipality for municipal purposes, any building not used for school purposes.[225]

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[215] Code, Sec. 673.
[216] Code, Sec. 676 (3).
[217] Code, Sec. 84.
[218] Code, Sec. 85.
[219] Code, Sec. 91.
[220] Code, Sec. 90.
[221] Code, Sec. 82.
[222] Code, Sec. 126.
[223] Code, Sec. 520.
[224] Code, Sec. 523 (I).
[225] Code, Sec. 678.

If a member is present but declines to vote upon a resolution, his silence will be construed as an affirmative vote upon those questions requiring only a majority of the members present, and constituting a quorum:

> It is * * * the general consensus of judicial opinion in various States, as well as that of Cushing's Manual and of textbook writers upon the subject of the procedure of public boards or bodies that where a majority vote of those present and constituting a quorum is required for the passage of a resolution those who do not vote will be considered as acquiescing in the passage of the resolution before the board and to have accordingly voted in the affirmative. * * *
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> Such was also the opinion of the New Jersey Supreme Court in the case of Mount vs. Parker, 32 N. J. L. 341, which held as follows:
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> "It being the well-established law, that where no specified number of votes is required, but a majority of a board, regularly convened are entitled to act, a person declining to vote is to be considered as assenting to the votes of those who do."[226]

Whenever the law requires a specified number of votes, however, such as a majority of the full number of the board, this rules does not hold. In a case involving the fixing of a teacher's salary, which requires a majority of the full membership, the following rule was set forth:

> In this case * * * a specified number of votes is required and since the board consists of nine members an affirmative vote of five is necessary for the passage of the resolution.[227]

This rule makes it evident that when a specified number of votes is required to pass a resolution, the majority set by law must be secured by a definite affirmative vote and not through the implied acquiescence of non-voting members.

Since the president of the board is, like all other members, entitled to a vote, he does not cast the deciding vote in case of a tie, except in the same sense that any other member of the board does so. However, circumstances may seem to give his vote that authority:

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[226] Thorpe v. Board of Education of City of Bayonne, State School Report, 1928, p. 94, decision of Com. of Ed., June 7, 1928, affirmed by St. Bd., Nov. 3, 1928.

[227] Minihan v. Board of Education of City of Bayonne, State School Report, 1929, p. 78, decision of Com. of Ed., Mar. 25, 1929, affirmed by St. Bd., July 13, 1929.

> Decisions are numerous to the effect that in the case of a tie the chairman's announcement that the motion has carried is equivalent to a casting vote.[228]

Even if a board has passed a resolution, it may reconsider it at the same meeting, under certain conditions. In Tunison v. Warren Township, the board had awarded a transportation contract to one bidder, but later during the meeting, when additional information was received, reconsidered its action and awarded it to another bidder. The Commissioner, in accordance with principles laid down by the courts in State v. Foster, 8 Vr. 107, and Whitney v. Van Buskirk, 11 Vr. 467, ruled that if the person to whom a contract is first awarded is not officially informed by the board of education that the contract had been awarded to him and if there had been no public promulgation of such action, and if the board took no action inconsistent with a further review of the award to this person, but at the same meeting proceeded to reconsider its original action by adopting an inconsistent resolution awarding the contract to another, the board was not only within its rights in awarding the contract to the second person, but such action was legally accomplished as a reconsideration at the same meeting of its original action in awarding the contract to the first person.[229]

It should be noted that in this case the resolution reconsidered concerned a transportation contract which the law does not specify must be awarded to the lowest bidder.[230] This action would probably not have been possible under most circumstances with the usual type of contract.

A board of education may perform certain of its functions, at least as a preliminary step to final action, through committees. The authority with which such a committee may be clothed, however, seems to be definitely limited. It cannot be given authority to take over the powers which the board itself is commanded to exercise. The decision in the case of the Application of Wilson Taylor illustrates this point well. In this case, it appears that the board of education of Hoboken had adopted the following resolution:

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[228] McCurdy v. Board of Education of Matawan, S. L. D., p. 134, decision of Com. of Ed., Oct. 19, 1926, affirmed by St. Bd., Feb. 5, 1927.

[229] Tunison v. Board of Education of Warren Township, Somerset Co. (In *MSS.*), decision of Com. of Ed., Oct. 21, 1929, affirmed by St. Bd., Feb. 1, 1930.

[230] See Chapter VII, p. 181.

> Resolved, That the president appoint a committee of three, to be known as the Committee on Schools, to which committee the president of the Board of Education, until otherwise directed, may refer for examination and consideration matters concerning schools and school affairs; and, in conjunction with the president, shall have the power to act summarily in the interest of the public schools in cases of emergency. Said committee to report to the Board at its regular meetings.

The Commissioner expressed the following opinion:

> This resolution gives to a committee the power to act summarily in case of emergency, and leaves to the committee, or the president, the right to decide as to the emergency. It is true that the resolution directs the committee to report to the board, but there is nothing to show that the action of the committee is not final, or that the report to the board is for any purpose except as a matter of information. In certain matters a vote of a majority of all the members of a Board of Education is required, and in all other matters the vote of a majority of a quorum is necessary. All business must be transacted in open meetings of the Board, regularly called. A committee can only consider matters referred to it and report its conclusions thereon to the board. The resolution under consideration attempts to give to a committee full power to act in certain cases and is, therefore, illegal.[231]

The functions of a board committee, in other words, may be described as being preliminary to the official action of the board, or may be subsequent to such action, as a result of a delegation of powers by the board. It cannot, however, substitute its own action for that of the board, as was indicated in the decision just quoted.

An instance of committee action preliminary to that of the board is the following:

> A board of education organized under Revision of 1900 (P. L. 1900, p. 192) in seeking proposals for a contract to supply school

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[231] In the Matter of the Application of Wilson Taylor, etc., S. L. D., p. 46, decision of Com. of Ed., Aug. 22, 1912.

> furniture, may delegate to a committee the duty of preparing and submitting specifications and of conducting negotiations for the contract, provided the proposals and the result of the negotiations is considered by the board before the award of the contract.[232]

E. Interpretation of Powers and Duties of the Board of Education

Elsewhere in this chapter the functions of the local board of education as they appear in the law were rather extensively outlined.[233] It remains to give for these powers of the board the interpretation of the school tribunals and of the courts.

1. The powers of a board of education under the statutes are to be strictly construed:

> Where public bodies are entrusted, by statute, with powers of a general nature, it must appear from an inspection of all their proceedings, when properly before the court, that they have kept strictly within their sphere.[234]

As was indicated in the early part of this chapter, its powers are only those granted by the state:

> A municipal corporation, being a creature of the state, possesses only such powers as the state confers on it.[235]

The degree of strictness with which its powers are to be interpreted is indicated in the decision in the same case:

> In construing a grant of power to a municipality, any fair, reasonable doubt concerning the existence of the power is resolved against the municipality, and the power is denied.[235]

Whether a power is permissive or mandatory in its application is at times a matter of doubt. Such words and phrases as "may" or "have the power" require interpretation by the court. A general rule in such instances seems to be:

> The true rule of construction is, that the word *may* is to be taken as meaning *must* or *shall* only in cases where the public interest and

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[232] Kraft v. Board of Education, 67 N. J. L. (38 Vr.) 512, 51 A. 483. See also Schwitzer v. Board of Education of City of Newark, 79 N. J. L. 342, 75 A. 447.

[233] See this chapter, pp. 87–98.

[234] State, Wilkinson v. Trenton, 36 N. J. L. (6 Vr.) 485, affirmed in 36 N. J. L. (7 Vr.) 499.

[235] Federal Shipbuilding, etc., Co. v. Bayonne. See footnote 14 *supra.*

rights are concerned, and where the public or third parties have a claim *de jure* that the right shall be exercised. In other cases the enactment is not imperative, but left to sound discretion.[236]

The strict construction placed upon the powers of the board is not to be interpreted as robbing them of initiative, especially in Article VII districts, and as requiring them to consult the people at other steps than those set forth in the law:

> It is no part of our scheme of government that the governing body selected by the people should be able to shirk all responsibility and refuse to take any important action unless they first submitted the proposed action to a vote of the people.[237]

2. Delegation of powers of the board.

Some functions of a board of education can be delegated, but others must be performed by the board alone:

> In the absence of legislative authority, a municipal corporation cannot delegate its legislative functions, but it may delegate ministerial or administrative functions.[238]

The same rule, which is here applied to legislative powers, is true also of judicial powers:

> A Board of Education cannot delegate to a superintendent or principal judicial powers conferred upon it by law. It cannot legally delegate to the superintendent or principal the power of deciding whether or not a pupil shall be expelled.[239]

Some of the respects in which authority can be delegated to officers or agents are as follows:

(a) Executing school bonds (Article VII districts):

> Resolution of a board of education authorizing the president and clerk to execute certain school bonds held to confer complete authority on such officers for the purpose.[240]

(b) Controlling school district business and property:

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[236] State, Grant pros. v. Newark, 28 N. J. L. (4 Dutch.) 491. See also Davison v. Davison, 17 N. J. L. (2 Harr.) 169, 171; Seiple et al. v. Borough of Elizabeth, 27 N. J. L. (3 Dutch.) 407.

[237] Bayonne v. Garven, 41 N. J. L. J. 269.

[238] Schwartze v. City of Camden, 75 A. 647, 77 N. J. Eq. 135.

[239] Spence and Spence v. Board of Education of Atlantic City, S. L. D., p. 286, decision of Com. of Ed., Jan. 4, 1915.

[240] Linbarger v. Board of Education of West New York, 85 A. 235, 83 N. J. L. 446.

> The powers of the president of a corporation over its business and property are strictly the powers of an agent,—powers delegated to him by the directors, who are the managers of the corporation and the persons in whom the control of its business and property is vested.[241]

An example of the delegation of power in respect to consummating the sale of school property, a transaction which is customarily performed by the board as a unit, is found in the following:

> The authorization to its secretary to accept an offer binding on the board of education was not an unlawful delegation of its powers. The price had been fixed, and the exercise of the power involved neither judgment nor discretion. The secretary's action was purely ministerial and perfunctory.[242]

(c) In certain types of contracts. This would not include contracts for erecting buildings, transportation contracts, nor teachers' contracts. It might include contracts for school supplies up to $250, or for building repairs up to $500. The following rule shows that within the provisions of the statutes, contracts are at times made by authorized agents:

> Contract to obligate corporation must have been its act either by corporate action, that of authorized agent, or by adoption and ratification.[243]

In most cases, it is probable, delegation of authority to officers or subordinates is controlled by rules and regulations. For example, a board may delegate to its superintendent or supervising principal authority to transfer pupils; to recommend teachers; to inspect or report upon school property. It may delegate to a committee of the board under its rules the preparation and submission of its budget for approval by proper authority; the securing of bids on a building project or upon equipment. It may delegate to a teacher authority to exercise certain control over school property or school pupils. In all cases, however, the authority delegated must be such as is legally capable of delegation, or must be subject to the legislative or judicial action of the board.

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[241] State Bank v. Holcomb, 12 N. J. L. (7 Hal.) 191.

[242] Ames v. Board of Education of Montclair, 97 N. J. Eq. 60, 127 A. 95 (1925).

[243] Feist and Feist v. A. and A. Realty Co., 145 A. 478.

3. Functions in relation to the establishment and control of schools, school property, and the program of studies.

Previously in this chapter were shown the duties and the powers of boards of education as respects establishment and control of schools so far as legal provisions are concerned. There seems to be no specific provision in the law for the establishment of high schools except junior high schools. There are provisions for the control of their programs of studies, their student body, their teaching staff, and the school plant, but none concerning their establishment, except the following:

> Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include * * * courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years.[244]

There seems to have been very little controversy in the past on the question, judging from the number of decisions by courts or school tribunals.

The case of Landis v. School District is one of the few cases applying to the establishment of schools above the elementary grades, and expresses an important principle:

> The school laws are not rendered special or local, or otherwise unconstitutional, by the fact that under them a higher grade of education may be afforded to the children in one district than that offered to those in another.
>
> * * * * *
>
> Beyond the constitutional obligation [to provide for maintenance and support of a thorough and efficient system of free public schools for all children in the state of ages 5 to 18] there still exists the power of the legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public

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[244] Code, Sec. 196.

> service. On this power, I think, rests the laws under which special opportunities for education at public expense are enjoyed.[245]

The board has a large degree of control over school property, and is definitely responsible for its care. In the matter of the use of school property for community purposes, there seems to have been a difference of opinion in the decisions. The earlier decisions seemed to place upon the persons or organizations applying for permission to use the building or grounds the burden of proving that their request was legitimate, and while conceding the power to school districts to permit use of school property, seemed to regard the protection of the school property as of greater importance than the granting of the privilege of its use by the community:

> There is no express provision in Article VI authorizing the use of school buildings for other than school purposes, but an examination of Articles VI and VII discloses that in the latter the powers of the Board of Education are prescribed with considerable detail, while in Article VI they are expressed in general terms. I am unable to discover any reason for permitting the use of a schoolhouse in a borough district for other than school purposes and prohibiting such use in a city district, and I am of the opinion that it was the legislative intent to give to the boards of education in both classes of districts like powers in the control and management of school buildings. * * * I think such use should be permitted unless there is an express statutory prohibition. A Board of Education must use reasonable discretion in the exercise of this power, and must not permit a school building to be used for other than school purposes at any time when such use would interfere with the regular school sessions.[246]

This opinion given in 1912 is supported strongly by another in 1919:

> It is my opinion that a board of education has in a large degree discretionary power in the matter of permitting the use of school property for other than the usual school purposes. [Under Chapter 35, P. L. 1917, governing use of school buildings].[247]

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[245] Landis v. School District, 57 N. J. L. (28 Vr.) 509.

[246] Klein et al. v. Board of Education of Jersey City, S. L. D., p. 317, decision of Com. of Ed., Nov. 20, 1912.

[247] Pfaffhausen v. Board of Education of Town of Union, County of Hudson, State School Report, 1919, p. 214, decision of Com. of Ed., June 19, 1919.

In the same year, however, a decision seemed to reverse the principle on which these two opinions rest, and placed the burden upon the board of showing good cause why school property should not be given over to public use upon reasonable request by proper persons. In this instance, a group of citizens had applied for the use of a school auditorium for the purpose of discussing and criticizing school policies. The decision of the Commissioner noted that a board of education

> * * * is enjoined by law to grant for certain purposes the use of the schoolrooms when not used for ordinary school purposes; but of course permission to use * * * [them] must be subject to the exercise of a proper discretion.[248]

The opinion of the Commissioner stated that if the board arbitrarily refuses such use, and gives no qualified permission to use the building nor exacts any conditions for such use, it is not exercising a sound discretion, when a proper application is made for the use of the auditorium by responsible citizens and residents of the district, even when the meeting is to be held for the purpose of criticizing decisions of the board pertaining to the schools.

This principle of exercising a sound discretion must be exercised by the board in allotting the time for the use of the school property among the different applicants. In Nutley, two athletic organizations had applied for the use of school grounds, and the board granted exclusive use for the season to the one which first applied. The Commissioner ruled in the following decision that this policy was not permissible:

> The Commissioner of Education is * * * of the opinion that a board of education cannot grant to any association or organization for a whole season the exclusive use of school property when there are other applicants for the privilege.[249]

Elsewhere in this chapter were set forth provisions of the law for purchase, sale, transfer, and exchange of school property. The power also to lease school property is given to boards of education in both Article VI and Article VII districts.[250] In the case of Article VII districts, however, the Commissioner has ruled that this power is subject to the approval of the voters. This decision stated that under Section 86, paragraph 4, P. L. 1903, a board of education has no authority to lease any lands belonging to the school district without first obtaining the authority of the legal voters of the district given at an annual or special election, after stating in the notices calling the meeting that the proposition of leasing a portion of the school property will be submitted.[251]

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[248] Stretch v. Board of Education of West Hoboken, State School Report, 1920, p. 179, decision of Com. of Ed., Nov. 6, 1919, affirmed by St. Bd.

[249] Nutley Lyceum v. Board of Education of Nutley, State School Report, 1920, p. 195, decision of Com. of Ed., Apr. 9, 1920.

The power to determine the program of studies for the schools of a district is according to the law to be partly in the hands of the board of education. The Commissioner of Education may ''prescribe a minimum course of study for the elementary schools and for the high schools or for either,''[252] if he sees fit, and the county superintendent is required to ''prepare and establish a uniform course of study and a standard of graduation in the schools under his supervision.''[253] Local boards still possess a certain degree of power, however, after these minimum requirements are met. This is specifically provided for in the case of Article VII boards, which are to secure the approval of the county superintendent.[254] In Article VI districts this power is assumed to be granted under the provision which requires that ''every board shall have the supervision, control and management of the public schools * * * in its district.''[255] This power extends to all the schools in the district, even the high schools. The State Board, it is to be noted, has the power to approve or disapprove high school programs of studies.[256]

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[250] Article VI boards, Code, Sec. 61; Article VII boards, Code, Sec. 127 (VI).

[251] Wilguss v. Board of Education of Borough of Red Bank, State School Report, 1920, p. 180, decision of Com. of Ed., Nov. 11, 1919.

[252] Code, Sec. 9 (XI).

[253] Rules, No. 68, p. 507.

[254] Code, Sec. 127 (VII).

[255] Code, Sec. 64.

[256] Code, Sec. 2 (III), and Rules, Nos. 43–48.

4. The legislative function of the board of education.

Much has already been said in this study of the legislative function of the board of education. It is not always an easy task to distinguish among the three major functions, legislative, executive, and judicial, and such a classification of functions is not here attempted. For the purposes of this study, the legislative function will be interpreted to refer to the making of rules and regulations, or the performance of acts which are held to imply the making of rules and regulations, or to establish school policy.

The basic provision in school law for making rules and regulations is identical for Article VI and Article VII boards:

> Such board shall make, amend and repeal rules, regulations and by-laws not inconsistent with this act or with the rules and regulations of the State Board of Education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in said district, and also for the employment and discharge of principals and teachers.[257]

Other provisions are contained in the School Law concerning this function:

(a) Boards of education

> * * * may make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of such employment, and the promotion and dismissal of such teachers and principals, the salaries, and the time and mode of payment thereof, and may from time to time change, amend or repeal such rules and regulations.[258]

(b) Boards may make rules and regulations for transportation of children to and from school.[259]

(c) All boards are required to adopt rules and regulations providing for the necessary disciplinary measures to enforce the act prohibiting school fraternities.[260]

(d) All boards are required to make

> * * * such proper rules and regulations as may be necessary for the employment, discharge, management and control of the public school janitors employed by such board.[261]

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[257] Code, Secs. 65 A and 127 (III).

[258] Code, Sec. 165.

[259] Code, Sec. 184.

[260] Code, Sec. 188.

[261] Code, Sec. 390.

(e) All boards are required to make rules and regulations for the government of attendance officers, subject to the approval of the Commissioner of Education.[262]

(f) All boards are required to adopt rules for the government of the medical inspector and nurse, subject to the approval of the State Board of Education.[263]

(g) All boards are empowered to adopt rules and regulations for advertisement for proposals for furnishing supplies, or for capital outlay.[264]

(h) All boards are required to make rules for safekeeping and proper care of textbooks.[265]

(i) Boards (specifically Article VII) have power to adopt reasonable regulations concerning use of school property by the community.[266]

(j) Second-class cities given power to make rules and regulations for control of playground for pupils in public park.[267]

Rules and regulations may be established in effect by other means, it seems, than by resolution of the board:

> In the absence of written or printed rules, the acts of the board may establish its rules. When a new board is organized which does not adopt the rules of the preceding board or does not adopt rules of its own making, the acts of the board may be deemed to establish the rules under which it transacts business.[268]

There are three distinct limitations upon the power of a board to make rules and regulations. First, the rules must cover subjects or rights within the power of the board:

> Neither the State Board nor a local board of education has any authority to make a rule investing a local board with a definite power, such as that of suspension, which is not conferred by the School Law itself.[269]

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[262] Code, Sec. 246.

[263] Code, Sec. 335.

[264] Code, Sec. 66, and P. L. 1930, Chap. 48.

[265] Code, Sec. 228.

[266] Code, Sec. 127 (XI), 129.

[267] Code, Sec. 682.

[268] Palmer v. Board of Education of Township of Weehawken (In *MSS.*), decision of Com. of Ed., affirmed by St. Bd., July 12, 1930.

[269] Conway v. Board of Education of Borough of Edgewater, State School Report, 1928, p. 101, decision of Com. of Ed., June 27, 1928.

Second, any such rule must not be contrary to the provisions of statute law.[270] Third, it must be reasonable:

> The power given by statute to the governing body of a municipality to pass ordinances and enact other regulations relating to the various matters entrusted by the legislature to its jurisdiction, carries with it the implication (often expressed in the statute) that such regulations must be reasonable.
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> The burden of proving a municipal regulation unreasonable is on the party asserting it; and every fair intendent is in favor of its reasonable character.
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> When a municipal by-law or resolution is shown to be unreasonable *in toto,* it is the duty of the court to pronounce it a nullity.[271]

If a board consummate an action which is later shown to have been contrary to its own rules and regulations, the action cannot necessarily be called invalid for that reason alone, if it involves the rights of those dealing with the board, and the provisions of statute law have been observed. For instance, it has been ruled that if any teacher is appointed

> * * * in the manner required by the School Law, namely, a majority of all the members of the board, and [is a person] admitted to possess statutory qualifications for the [position] in question, it is in the Commissioner's opinion immaterial that [she] may have lacked qualifications prescribed by rules of the board of education, and that the violation of such rules in no way [affects] the validity of the [appointment].[272]

The statement of the law covers making, amending, and repealing rules and regulations by a board. The Commissioner has held, however, that this provision also covers the right of the board to suspend its rules:

> The School Law requires but a majority vote of the board of education in making, amending or suspending its rules.[272]

5. Judicial functions of the board of education.

The most clearly evident judicial functions of the local board are those pertaining to the hearings which it must give when charges are brought against an employee or an officer to remove him. The manner in which this is done is described in the chapter on "The Legal Status of Teachers, Supervisors, and Principals."[273] It is sufficient for present to point out the particular cases in which a hearing must be given by the board according to the law:

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[270] Nommensen v. Hoboken Board of Education, S. L. D., p. 166, decision of Com. of Ed., Jan. 4, 1923, affirmed by St. Bd.

[271] McGonnell v. Commissioners of Orange, 98 N. J. L. 642.

[272] Noonan and Arnot v. Board of Education of Paterson, S. L. D., p. 116, decision of Com. of Ed., Jan. 7, 1925, affirmed by St. Bd.

(a) Dismissing a teacher or principal during the period of contract;[274]
(b) Dismissing a teacher or principal who is under tenure, or decreasing his pay;[275]
(c) Dismissing, suspending, or decreasing pay of janitor under certain conditions;[276]
(d) Dismissing a war veteran under certain conditions;[277]
(e) Removal of secretary or district clerk.[278]

A board is required to give a hearing under other conditions not mentioned in the law. It seems probable from the decision of the State Board in the case of Pearce et al. v. Burns and the Gloucester City Board of Education,[279] that a hearing must be given when charges are brought against a city superintendent. A decision of the court, in case a question arises concerning the responsibility of the lowest bidder, is that

> Under P. L. 1904, special sessions, p. 21, § 53, requiring a municipal board of education to award a contract for school supplies to the lowest responsible bidder, the board cannot determine against the responsibility of a bidder without giving him notice and an opportunity to be heard.[280]

As previously shown, a board cannot remove one of its members or officers without according a hearing.[281]

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[273] See Chapter X, pp. 293–295, 310–325.
[274] Code, Secs. 89, 167.
[275] Code, Sec. 179.
[276] Code, Sec. 391.
[277] P. L. 1929, Chap. 29.
[278] Code, Sec. 71.
[279] Pearce et al. v. Burns and Gloucester City Board of Education (In *MSS.*), decision of St. Bd., Jan. 6, 1923, affirming decision of Com. of Ed., June 5, 1922.
[280] Jacobson v. Board of Education (N. J.), 64 A. 609.
[281] See footnote 183 *supra.*

In all cases involving charges against principals and teachers, anyone may bring the charge, but the board must prosecute them, hear the case, and render the decision. It may also subpoena witnesses and administer oaths.[282] It is assumed that the board performs the same functions in other types of hearings, although the law is silent upon this point.

The judicial function of the board is exercised in other ways than in conducting hearings and rendering decisions. Many of its acts in the transaction of business are judicial in nature. One example of this is in the employment of teachers:

> Under Revision, p. 1076, making trustees of school districts a body corporate, the employment or dismissal of a teacher is an act judicial in nature and should be done at a meeting whereof all the trustees have had notice and have opportunity to participate in.[283]

It seems evident that this act is judicial since it requires the forming of a judgment by the board as to the eligibility and suitability of the teacher, and her worth as compared with other candidates. To carry this a step further, it seems probable that any action of a board may be regarded as judicial in its nature when it requires the exercise of judgment and discretion, and the choice of one course of action among two or more such.

F. Control of Acts of Local Boards by School Tribunals and Courts

The right of a board to make decisions and to have them respected has been upheld many times by the Commissioner and the State Board. In a case involving the dismissal of a teacher, the State Board said:

> This Board will not disturb the finding of a local board on a question of this kind, provided it has reached its decision after giving a fair hearing and there is no showing of passion or prejudice on its part.[284]

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[282] Code, Secs. 179, 180.

[283] Townsend v. Trustees of School District No. 12, 41 N. J. L. (12 Vr.) 312.

[284] Cheesman v. Board of Education of Gloucester City, S. L. D., p. 156, decision of St. Bd., reversing decision of Com. of Ed., Oct. 28, 1921, decision affirmed by Supreme Court.

In a similar type of case, the State Board opinion said:

> It is our opinion that we should not interfere with the determination of a local Board of Education unless it appears that its conclusion was the result, not of honest judgment, but of passion or prejudice.[285]

In such an act as the selection of school furniture, the honest judgment of a board is respected by the school tribunals:

> The question as to whether or not the board acted wisely in selecting a certain type of furniture is not subject to review.[286]

The Supreme Court has stated this principle in general terms so far as regards the attitude of the courts:

> When municipal corporations are acting within the power and discretion vested in them by the legislature, in the absence of fraud the courts cannot interfere unless it appear that the power or discretion is being manifestly abused to the injury or oppression of the citizen.[287]

1. Use of the prerogative writs to control actions of boards of education.
    (a) *Certiorari.* This writ permits the reviewing by courts of acts performed by an officer or body. Examples of actions by school districts or school boards which would be subject to review are as follows:

        (1) School taxes illegally assessed will be set aside by *certiorari* by the persons aggrieved.[288]

        (2) If the trustees of a school district are guilty of fraud or error in law, it may be reviewed.[289]

        (3) One entitled, as the lowest bidder, to have a municipal contract awarded to him, may by *certiorari,* question the validity of its award to another.[290]

        (4) Where a municipal corporation, by action *ultra vires* or otherwise, embarks in a scheme which will result in an unlawful expenditure of public funds, any ordinary taxpayer may be admitted to prosecute a *certiorari* to review such action.[291]

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[285] Fitch v. Board of Education of South Amboy, S. L. D., p. 173, decision of St. Bd., Jan. 3, 1914, affirming decision of Com. of Ed., Oct. 13, 1913.

[286] Arnold v. Board of Education of Ewing Township, S. L. D., p. 17, decision of Com. of Ed., Oct. 26, 1914.

[287] Carling v. Jersey City, 71 N. J. L. (42 Vr.) 154, 58 A. 395.

[288] State, Kaighn pros. v. Browning, 28 N. J. L. (4 Dutch.) 556.

[289] Township of Morris v. Carey, 27 N. J. L. (3 Dutch.) 377, 404.

[290] State, McGovern pros. v. Inhabitants of City of Trenton, 60 N. J. L. (31 Vr.) 402, 38 A. 636.

[291] Rehill v. East Newark and Jersey City, 73 N. J. L. 220.

(b) Injunction. This writ refers to restraining boards from performing certain acts. Some of the applications of the writ of injunction are shown in the following decisions:

> (1) Equity has jurisdiction to prevent a municipal corporation from abusing its powers.[292]
>
> (2) An injunction will issue to prevent a municipal corporation or its officials from paying for work done under a contract, where such work is clearly not in compliance with the terms of the contract.[292]

(c) Mandamus. This writ refers to compelling the performance of duty. Examples of its use are quoted:

> (1) One whose removal by local board from position under school law has been set aside by state board is on proper showing entitled to mandamus commanding drawing and paying of salary warrant. [Concerning supervisor of buildings.][293]
>
> (2) A school teacher who has rendered services according to the requirements of the school law, and is refused compensation out of the fund especially provided for that purpose, is entitled to a mandamus to compel the proper officers to perform their duty, and to make payment of what is justly due.[294]

2. How and where action against a board must be brought.

(a) It must be brought against a district in its corporate name.

> The action must be brought against the district in its corporate name, and not against the trustees in their individual names, with the description appended of "Trustees, etc."[295]

(b) It cannot be brought in a justice's court, or court of local jurisdiction.

> That the trustees of a school district, in their corporate capacity, are not liable to be sued in a justice's court, must be regarded as settled.[296]

(c) It cannot be brought in a district court.

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[292] Bond v. Mayor and Common Council of Newark, 19 N. J. Eq. (4 C. E. Gr.) 376.

[293] Schwarzrock v. Board, 90 N. J. L. 370, 101 A. 394.

[294] Apgar v. School Trustees, 34 N. J. L. (5 Vr.) 308. See also Thompson v. Board of Education, 57 N. J. L. (28 Vr.) 628.

[295] Sproul v. Smith, 40 N. J. L. (11 Vr.) 314.

[296] School Trustees v. Stocker, 42 N. J. L. (13 Vr.) 115.

> District courts have no jurisdiction in actions against municipal corporations; no power to serve process thereon being given by Revision, p. 1304, § 23.[297]

(d) It cannot be brought in the circuit courts; it is under the jurisdiction of the supreme court, except where the special school tribunals are to be consulted.

> The power to review the proceedings of municipal corporations in matters affecting the rights and property of individuals, which is exercised by the supreme court by means of the writ of *certiorari,* cannot be conferred by the legislature upon the circuit court of the state.[298]

(e) All controversies and disputes arising under the school laws are to be decided by the Commissioner of Education, subject to appeal to the State Board of Education.[299] From the State Board they may be carried to the Supreme Court on *certiorari.*

G. Liability of Board of Education and of Board Members

To incur liability, some wilful or negligent act resulting in injury must have been performed by the person or body against whom the charge is brought, or by some officer or agent of the person or body charged with liability.

1. Liability of the school district and board of education.

The application of the general rule to a municipal corporation, or to a school district, is:

> A corporation itself, the legal entity, cannot commit either a wilful or negligent act. It is not responsible for the act of any person not its agent or servant, hence a declaration must contain words which impute liability to it through its actors—its officers, agents or servants. It must allege some act or default by these for whom the corporation must respond under the well established principle of *respondeat superior.*[300]

Under what condition, then, is a school district liable for the acts of its agents or servants? The following decision states the general principles:

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[297] Townsend v. Trustees School District, 41 N. J. L. (12 Vr.) 312.

[298] McCullough v. Essex Circuit Court, 59 N. J. L. (30 Vr.) 103, 34 A. 1072.

[299] Code, Sec. 18.

[300] Tomlin v. Hildreth, 65 N. J. L. (36 Vr.) 438, 47 A. 649.

> It is well settled that a municipal corporation is never liable in damages for the legal and proper exercise of a strictly governmental function, or for a breach or neglect of a public duty constituting a public evil or nuisance, affecting the body of the people as a whole, where the only remedy is by indictment, although individuals may sustain injury thereby; but it is so liable where the wrong doing creates only a private nuisance, for which no indictment will lie, or where there is active wrong doing chargeable to the corporation.[301]

2. Personal liability of board members, officers, or agents of a board.

If the corporation cannot in any certain case be held liable, it is possible that its officers or agents may be held liable personally. A rather complete statement concerning such personal liability was secured in 1916 by the State Board of Education from the Attorney-General, and reads as follows:

> The liability of a public officer may be either criminal or civil for his official acts, in addition to his liability for acts in his capacity as an individual member of society. This criminal liability may be either by common law or by statute. At common law the failure or neglect to perform a ministerial duty imposed upon him by law, makes the officer liable to indictment. In case of discretionary duties, a failure or neglect to perform, does not render the officer criminally liable, unless it can be shown to be wilful or corrupt. When a duty which has not been performed is one involving discretion, the failure to perform it is not of itself an indictable offense. The omission must be wilful in that case and due to corrupt motives. The statutory crime in New Jersey is for wilful neglect.
>
> In the case of duties not owed solely to the public, officers are liable for misfeasance, malfeasance or non-feasance in the performance of a ministerial duty, where it results in damage to an individual to whom a duty is owing. The rule is well settled that where the law requires absolutely an act to be done by a public officer, and he neglects or refuses to do such act he may be compelled to respond in damages, and a mistake as to such duty will not excuse the

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[301] Casey v. Bridgewater Township, Somerset Co., 151 A. 603. See also Board of Chosen Freeholders v. Strader, 18 N. J. L. 108; Kehoe v. Borough of Rutherford (Err. and App.), 65 A. 1046; Waters v. Newark, 56 N. J. L. (26 Vr.) 361, 28 A. 717, affirmed in 57 N. J. L. (28 Vr.) 456, 35 A. 1131; Florio v. Jersey City, 101 N. J. L. 535; Callan v. Passaic, 104 N. J. L. 643; Heintz v. Borough of Essex Falls, 151 A. 593; Roeck v. Newark, 33 N. J. L. (4 Vr.) 129; Bisbing v. Asbury Park, 80 N. J. L. 416, 78 A. 196; Olesiewicz v. Camden, 100 N. J. L. 336; Buckalew v. Board, 91 N. J. L. 517, 104 A. 308.

> offender. Also when an officer is bound by virture of his office to perform an act, the neglect to perform that act is an indictable offense. The statute is made to make the offense wilful in order to punish as a crime.
>
> The test whether an act is a ministerial act, the failure to perform which is indictable, or whether it is a discretionary act is whether the performance of the act can be compelled by mandamus. A ministerial act means one which an officer performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without a regard to or the exercise of his own judgment upon the propriety of the act done. It is a precise act, accurately marked out, enjoined upon particular officers for a particular purpose. Though there may be discretion in the manner of performing an act, it may still be regarded a ministerial act and compellable by mandamus if there is no discretion as to whether it shall be performed at all.
>
> The criminal liability for neglect, if wilful, of a ministerial duty would extend to the officer, though no damage resulted to any individual, or individuals, as a result of the neglect, unless some penalty should be prescribed by law for such failure, in which case the criminal offense would probably be merged by the infliction of the statutory penalty.[302]

Specific decisions upon certain points covered by the Attorney-General are as follows:

> The members of a public board acting in performance of a public duty are not personally liable in a civil suit for acts done in good faith.[303]

It is possible, however, that an officer or agent may be held criminally liable through indictment:

> The question of the criminal responsibility of the individual officers or agents of a corporation is a much narrower one than that of civil responsibility. To be held criminally responsible it must appear that the person indicted has been guilty of gross negligence, either in the performance of, or the omission to perform, some specific act, the performance of which is necessary in the discharge of the duty he owes to the public.[304]

Within the principles above noted, a number of cases have brought interesting decisions. In one instance, the wife of a school janitor assisted her husband in performing his duties in the school, and was injured when a partition confining coal in a bin, collapsed:

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[302] Opinion of Attorney-General John W. Westcott. Minutes of State Board of Education, Jan. 8, 1916.

[303] Johnson v. Marsh, 82 N. J. L. 4, 85 A. 761.

[304] State v. Young, 26 N. J. L. 264.

> The rule enunciated in Freeholders v. Strader, 18 N. J. L. 108, that if a municipal corporation owes a duty to the public, a neglect to perform it, resulting in injury to an individual, does not give a private right of action to such individual, is applicable to the case of the wife of the janitor of a public school acting as his assistant and injured in the performance of her duties by the collapse of a wall due to the presence of coal stored behind it.[305]

(a) Personal liability under the Crimes Act and similar acts.

Another important point arises in case a board member, superintendent, principal, or teacher is interested in the sale of supplies to schools or in contracts with the schools. The School Law[306] makes it unlawful for such persons to be pecuniarily or beneficially interested in the sale to their schools of textbooks, supplies, etc. The decision of the State Board holds that this applies only to such things as are furnished for the use of pupils in the public schools, and not to things furnished to school boards:

> We are of the opinion that nothing in this article applies, or can be made to apply to supplies of any kind furnished to school boards. The case does not constitute a dispute or controversy arising under the School Law, and, consequently, neither the Commissioner of Education nor the State Board of Education has jurisdiction in the matter.[307]

In his opinion on the same case, the Commissioner indicated that

> * * * a violation of this section by * * * a school board member is punished by removal from office.[307]

As was indicated in an earlier section, however, although a board member might be found guilty by the Commissioner or State Board of violation of this section of the school law, he could be removed only by indictment proceedings.

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[305] Johnson v. Board of Education of Wildwood, 102 N. J. L. 606.

[306] Code, Article XIV, Sec. 229.

[307] Park v. Hearon, S. L. D., p. 306, decision of St. Bd., Sept. 9, 1916, affirming decision of Com. of Ed., July 8, 1916.

In case a board member is interested in the sale of any materials to a school district, or in any contract with it, section 32 of the Crimes Act applies, as well as the provision of the School Law to which reference was just made. Section 32 of the Crimes Act states:

> Any member * * * of any board of education in any school district * * * who shall be directly or indirectly concerned in any agreement or contract, or directly or indirectly interested in furnishing any goods, chattels or supplies or property of any kind whatsoever * * * to the school district, * * * the expense or consideration of which is paid by the board of which such member is a part, shall be guilty of a misdemeanor.[308]

In order to make such an action by a board member criminal, however, it is necessary that his concern be corrupt:

> Under Crimes Act, § 32, making it criminal for certain officers to be concerned in any contract for public improvement, it is essential that the concern be corrupt.
>
> * * * * *
>
> Concern as stockholder in a corporation which makes a contract for a public improvement may suffice to render a public officer amenable to Crimes Act, § 32.[309]

There are other sections of the Crimes Act which apply to school board members. Section 28 makes it a misdemeanor for

> * * * any member of any public board * * * to solicit or receive, either directly or indirectly, any money or valuable thing * * * for his vote in the appointment or selection of any person or persons to any position in any department of any public body.[310]

The penalty provided is not only punishment as provided by law but disqualification from holding any public office in the state thereafter.

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[308] Section 32, Crimes Act, P. L. 1907, Chap. 124.

[309] State v. Kuehnle, 85 N. J. L. 220, 88 A. 1085, affirming judgment 84 N. J. L. 164, 85 A. 1014.

[310] Crimes Act, Sec. 28, P. L. 1898, Chap. 235. (Code, Sec. 684.)

The Crimes Act also makes bribery in the sale of supplies or in the doing of any official work, a misdemeanor,[311] and likewise the disbursement or ordering or voting to disburse funds in excess of appropriations or of the limits set by law.[312]

3. Liability of the school district under the Workmen's Compensation Act.

The Workmen's Compensation Act specifically includes boards of education within its provisions. Under this law, a school district is liable to its employees for injuries which they may sustain in the course of performing their duties, but is not liable to any persons holding elective offices in the school district. The school district may carry liability insurance if it so desires, but cannot be required to do so in order to cover such cases.[313]

4. Liability for injury to pupils.

The extent of liability of the board of education or its agents for injuries to pupils is indicated in an opinion of the legal division of the Department of Public Instruction:

> As far as injury to school pupils is concerned, this department has been advised in official opinions by the Attorney-General that in the absence of any express statutory provision imposing liability upon boards of education for physical injury sustained by pupils while on public school property or while being transported to and from school, a board of education can be held in no way responsible for any injury thus sustained by a pupil. This exemption, however, the Attorney-General's opinion declares in no way extends to any agent of the board of education or to a transportation contractor who in the event of negligence on his part can be held personally responsible.[314]

Another situation involving pupils arises in the case of school pupils serving as traffic officers. An opinion from the Attorney-General's office was as follows:

> In reference to the responsibility in regard to injuries sustained by school pupils acting as traffic officers.

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[311] Crimes Act, Sec. 30, P. L. 1898, Chap. 235. (Code, Sec. 686.)

[312] Crimes Act, Sec. 31, P. L. 1914, Chap. 219. (Code, Sec. 687.)

[313] P. L. 1917, Chap. 178, p. 523, as amended in P. L. 1931, Chap. 355.

[314] *Education Bulletin,* Vol. 11, No. 3, Nov., 1923, p. 71.

> I am of the opinion that the board of education in its corporate capacity would not be responsible for any injury suffered by the pupil; nor would it be responsible for damages sustained by others in consequence of the negligent act of the pupil. There may be, however, conditions under which the school principal designating such boy might incur liability to the boy and his parents in case of injury, if the boy selected by such principal was not capable of performing the service. In other words, if a school principal sent a child out who was not mentally or physically capable of performing this quite dangerous service, she might be charged with negligence in so doing and thus made responsible for the consequent damage. If the parents consented to the designation of their child, that might relieve her of any damage, so far as they were concerned, but would not so far as the child was concerned, as they would be incapable of consenting to any act which would operate to his detriment or injury. Whether or not the child was mentally or physically capable would, in most instances, at least, be a jury question.
>
> I am further of the opinion that the municipality as such would not incur any liability if they designated the child, but the individual, whether he be the Mayor or Chief of Police, who made the designation would be, in my opinion, personally responsible if he did not use due care in selecting a child fit for the purpose; and whether or not he used such care would, as I have above said, be in most cases, and perhaps in all cases, a question for the jury.[315]

5. Withholding state aid as a penalty upon a school district.

There are at least three situations under which a school district may lose its apportionment of state funds. It is provided in the first place that

> * * * in case a board of education, or any officer thereof, or the legal voters of any school district, or any board or officer of the municipality in which any such school district shall neglect or refuse to perform any duty imposed upon such board, officer or legal voters by this act or by the rules and regulations of the State Board of Education * * * [316]

the apportionment of state moneys is to be withheld until the County Superintendent notifies the county collector that the provisions of the law and the rules and regulations of the State Board have been carried out.

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[315] *Education Bulletin,* Vol. 11, No. 3, p. 79, Nov. 1924. Opinion of Assistant Attorney-General H. R. Coulomb, approved by Attorney-General E. L. Katzenbach, to Assistant Commissioner C. J. Strahan.

[316] Code, Sec. 25.

The second case in which a district faces penalty in respect to state apportionment, causes not the withholding but the actual loss of such funds. The law requires that this penalty be imposed whenever a school district fails during any year to maintain its public schools for a period of at least nine months.[317] The Commissioner of Education, however, may remit this penalty for good cause.

In the third place, state funds may be withheld from a school district by the custodian of school moneys on the order of the county superintendent of schools, if the district fails to provide suitable facilities or accommodations for the education of the children.[318] This would include schoolhouses, equipment, courses of study, and, where found necessary, transportation service.

Summary

The local school unit in New Jersey exists in three typical forms—the Article VI district, or city school district; the Article VII district, commonly consisting of townships, incorporated towns, and boroughs; and the county, as it is utilized for vocational school purposes. There are many exceptions and many variations under the law to the pure types of Article VI and Article VII school districts, which were created by law evidently in response to local sentiment. In New Jersey, school districts are to all intents and purposes municipal corporations.

The school boards in New Jersey are corporate bodies and as such possess large powers locally in certain functions. In securing local funds they are subject to certain local restraints, which for Article VI boards are exercised by the Board of School Estimate and by the governing body of the municipality, and even in one case by the voters. In Article VII boards this control is exercised by the people through elections. In many other respects the action of the board is restricted by legal provisions, such as those which refer to the manner of conducting its business. When acting within its proper authority, however, and in a legal manner, and exercising good faith, it is not likely to be subject to interference by any judicial authority.

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[317] Code, Sec. 50.
[318] Code, Sec. 196.

The student of education is likely to question the desirability of having the city school districts subject in such a large degree, and indeed in any degree, to the control of the municipal authorities. Not only in finances, but also in the selection of its board of education, this type of district is to a large degree subordinate to the city government.

The proper performance by school boards of the functions required or permitted by law is encouraged and demanded by laws which provide penalties either for the school districts or for individual board members in case of illegal acts or neglected duties. The evident purpose of the law is to protect the state, the school district, the public, and the pupils from inefficiency and misconduct by the public servants of the state.

CHAPTER VI

THE SCHOOL ELECTION IN ARTICLE VII DISTRICTS

I. Introduction

The school election or school meeting, as it is sometimes called, is held only in the Article VII school districts in New Jersey. It is true that in Article VI districts an election is required in case of a proposal to issue school bonds beyond the limit of 6% of the taxable valuation of real and personal property in the district, or in any district to adopt the provisions of the Civil Service Act.[1] The latter elections are called by the governing body of the municipality at either a general, a special, or a municipal election, and are therefore essentially municipal, and not school elections.

Several kinds of business may be transacted at the annual meeting in the Article VII district. One type of business is mandatory at each such meeting, namely, the election of school board members.[2] Such a meeting may also be made the occasion for the vote of the electors upon the annual budget as proposed by the school board,[3] or for a vote to raise funds either by special tax or by bond issue for capital expenditures.[4] At such a meeting, a vote may also be taken within certain legal limitations to rescind action taken at a previous meeting to authorize raising funds:

> There is nothing in the law which authorizes or prohibits calling a meeting for the purpose of rescinding action previously taken. The right exists, therefore, under the general power to call a meeting when the interests of the schools require it.[5]

Still another type of action possible at an annual meeting is that which occurs when a school board decides to reduce its size, in which case it must submit to the voters at such time the question of reducing it to five or to three members.[6]

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[1] Bonding election, Code, Sec. 104; civil service election, P. L. 1915, Chap. 17.

[2] Code, Sec. 116.

[3] Code, Sec. 139.

[4] Code, Secs. 143, 152.

[5] Stoltz v. Board of Education of Warren Township, State School Report, 1912, p. 121, decision of Com. of Ed.

Special meetings are permitted for three purposes. The first is to vote on the annual budget. The second is to raise funds by special school tax for any or all of the purposes for which they may be raised in the annual budget, most of which represent current expenses.[7] The third is to raise money either by bond issue or by special tax for capital expenditures,[8] or to rescind such action when taken at a previous election.

II. QUALIFICATIONS OF VOTERS

Qualifications for voters in school elections are prescribed partly by the state constitution and partly by school law:

> Trustees of school districts are municipal officers, and being elected by the people, those who vote for them must have the qualifications required by Art. II of the constitution of New Jersey.[9]
>
> It is the legislative province to determine who are legal voters, to prescribe the means of voting, and to prevent all others from voting.[10]

A. Qualifications Established by the State Constitution[11]

The constitution of the state sets up the following qualifications:

1. United States citizenship;
2. Age, twenty-one years;
3. Residence in the state for one year;
4. Residence in the county in which he claims his vote, five months before the election;
5. Persons in the service of the United States armed forces and stationed in any political district not to be considered residents merely on basis of such assignment;
6. Paupers, idiots, insane persons and persons convicted of crimes, unless restored to suffrage, are deprived of their right to vote.

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[6] Code, Sec. 117.
[7] Code, Sec. 139.
[8] Code, Secs. 143, 152.
[9] State v. Deshler, 25 N. J. L. (1 Dutch.) 177.
[10] In re Freeholders of Hudson County, 105 N. J. L. 57.
[11] Constitution of State of New Jersey, Article II, Sec. 1.

B. Qualifications Established by School Law

Under the school law, one possessed of constitutional qualification may establish his right to vote at a school election in one of three ways:

1. By having his name on the registry list as having been registered to vote at the preceding general election;[12]
2. By being one who is otherwise qualified as an elector of the General Assembly and became of age since the preceding general election, providing such person makes application on the Saturday preceding the annual school election at the polling place of his voting district to the clerk of the board or the board member between the hours of 7 and 9 P. M.;[13]
3. By being one who, while not registered to vote at the preceding general election, is otherwise qualified and registers on the Saturday preceding the annual school election as provided in preceding section.[13]

III. ESTABLISHMENT OF VOTING DISTRICTS AND POLLING PLACES

The Board of Education of each school district is required to provide at least one suitable polling place in a schoolhouse in the district. If there is more than one schoolhouse in the district, the board may designate such additional polling places as it sees fit, and is required to do so upon petition of at least 5% of the qualified voters of the district submitted at least twenty days prior to the date of the election.[14] It has been held, however, that the board does not need to wait for such a petition but may act upon its own initiative:

> The Commissioner cannot agree with the contention of the appellant that the board can upon its own volition establish but one polling place or that only one polling place can be opened upon petition.[15]

Whenever a board of education establishes two or more such voting places, they are required also to establish the lines or boundaries of the voting districts and to give public notice in the same manner as for school meetings or elections.[16]

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[12] Code, Sec. 120 (12).

[13] Code, Sec. 120 (12), and P. L. 1930, Chap. 169.

[14] Code, Sec. 120 (12, a).

[15] Tunison v. Board of Education of Warren Township, Somerset Co. (In *MSS.*), decision of Com. of Ed., Apr. 5, 1930, affirmed by St. Bd., July 12, 1930.

The clerk of the board is empowered and instructed to provide the proper equipment for polling places to enable the election officers to carry out the duties required by law. Such equipment consists of tables, chairs, lights, and other necessary things for the officials.[17] It is to be noted that the school law does not require the use of election booths for voting.

IV. Calling the Election

Annual school meetings in New Jersey Article VII districts are held on the second Tuesday in February,[18] and special meetings are held at such time as determined by the board.[19] The necessity for a call for such a meeting as a result of board action is emphasized by the following:

> Special meetings of the voters of a school district must be called by the board of trustees regularly convened.[20]

The most significant provision concerning the calling of special voters' meetings is the following:

> The Board of Education shall have power * * * to call a special meeting of the legal voters of the district at any time when in its judgment the interests of the school require it, or whenever fifty of such legal voters shall request it by petition so to do. In the notices of any special meeting, called upon petition as aforesaid, shall be inserted the purposes named in said petition so far as the same are not in conflict with the provisions of this act. No business shall be transacted at any special meeting except as shall have been set forth in the notices by which said meeting was called.[21]

The decisions of the Commissioner and of the State Board seem to indicate that Article VII school boards are not required to call special meetings on petition of fifty legal voters if they feel that the interests of the schools do not require it, or if in their judgment the purposes named in the petition are in conflict with school law:

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[16] Code, Sec. 118.
[17] Code, Sec. 120 (17).
[18] Code, Sec. 118.
[19] Code, Sec. 127 (X).
[20] Bogert v. Trustees, 43 N. J. L. (14 Vr.) 358.
[21] Code, Sec. 127 (X).

> I find that it is the duty of a Board of Education, when it receives a petition signed by fifty legal voters resident in a school district asking that a special meeting be called, to ascertain whether the purposes named in the petition are in conflict with the provisions of the School Law. If the Board finds that there is conflict, then it is not bound to call such special meeting.[22]
>
> The intent of the law seems to be that the Board, by its own initiative, or by a reminder from fifty legal voters, could, in its judgment, call a special meeting. * * * We think the reading of paragraph X should be that school boards have the *power* to call special meetings [of voters] but are not compelled to do so if in their judgment the interests of the school do not require them.[23]

In at least two instances, the petition of the voters gave as the purpose of the request that the legal voters might reconsider action taken previously to provide funds for capital outlay. In both cases the school board was sustained in its refusal to call the meeting:

> The Board of Education had authority given it in this paragraph [Code, Sec. 127, par. IV] to build a new schoolhouse and equip it; it had also "the previous authority of a vote of the legal voters of the district." Any new meeting called for the specific purposes of undoing or nullifying the authority thus given would be "in conflict with the provisions of this act." If permitted or allowed it would render nugatory or ineffective any action that the Board might take. For if the fifty petitioners were defeated on their first petition they could immediately get up a second or a third or tenth petition, and thus go on indefinitely to the defeat of the law and to the rendering void of the purposes of the school system.[24]

This would seem to establish the principle that a petition of fifty legal voters is not effective to require a board to call a special election when it is proposed thereby to secure reconsideration of an action by the voters which approved and required the performance of acts by the board which the board felt were necessary to the maintenance of efficient schools.

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[22] Wills v. Board of Education of Upper Freehold Township, S. L. D., p. 111, decision of Com. of Ed., Mar. 22, 1916.

[23] *Ibid.*, decision of St. Bd., July 1, 1916, affirming decision of Com. of Ed.

[24] Wills v. Board of Education of Upper Freehold Township. See footnotes [22] and [23] *supra.*

Similar decision in Krewson v. Board of Education of Borough of North Plainfield (In *MSS.*), decision of Com. of Ed., Feb. 20, 1923, affirmed by St. Bd., June 2, 1923.

Both annual and special meetings of voters must be advertised in two ways. In the first place, at least seven notices of the election must be posted by the district clerk at least ten days before the election. These notices must specify the day, time and place or places for voting,[25] and must contain the proposals, if any, as framed by the Board of Education to be submitted to the people for vote, when appropriations are being requested of the voters.[26] One notice must be posted on each schoolhouse within the district, and the others at such other places as the board may direct. The second type of advertisement must be made by the clerk at least one week before the election in some newspaper circulating in the school district.[27]

The question has arisen in a number of instances whether an exact compliance with all of the provisions concerning the calling of school meetings is essential to the validity of action taken at such meetings. The following decision seems to state the principle usually followed:

> Legal authorities hold, and the ruling is supported by many States, that a substantial and not an exact compliance with a statute prescribing the method of calling an election is sufficient in cases where the election is proved to have been made generally known to all the district voters by means of statute or otherwise, and where a full and fair expression of the popular will has been demonstrated at such election. (Brown vs. Street Lighting District, 70 N. J. L. 762). Such substantial compliance, however, is not sufficient where it can be shown that a sufficient number of persons were deprived of knowledge of such election to change the result. (Cyc., page 324, N. 73).[28]

If there is one indispensable requirement for all notices which must be met, it is that the full ten days' notice must be given:

> A special meeting of the voters of a school district cannot legally be held under sections 39 and 86 of the school law (Rev., p. 1070) unless ten days' notice thereof be given.[29]

The importance of other provisions concerning notices of the meeting and the result following violation thereof in elections concerning the raising of funds by special tax or by school bonds, is discussed in the chapter on "The Legal Basis of Financing Public Education in New Jersey."[30]

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[25] Code, Sec. 118, 140.

[26] Code, Sec. 143.

[27] Code, Sec. 120 (12).

[28] Eckert v. Long Beach Board of Education, S. L. D., p. 21, decision of Com. of Ed., June 27, 1923.

[29] Canda Mfg. Co. v. Woodbridge, 58 N. J. L. (29 Vr.) 134. See also Davis v. Rapp, 43 N. J. L. (14 Vr.) 594.

V. THE BALLOT

Voting at either a general or a special election, and on either the election of board members or on other matters, must be by ballot.[31] Since the act of 1922 refers to the "official ballot," it may be assumed that this is, in general, the only form of ballot to be used at the polls.[32]

A. Form of Ballot

Where at an annual meeting the qualified electors are to vote both on the election of board members, and upon the annual budget or upon appropriation of funds for capital outlay, the names of candidates for board membership are placed first, and the proposals for which appropriations are sought are to follow immediately after such names.[33] The ballot must be printed on plain white paper uniform in size and quality and of sufficient thickness that the printing will not show through. It must not carry any mark, device or figure on front or on the back except as provided by law.[34] The ballot is to be printed.[35] Names of candidates are to be printed according to the alphabetical order of their surnames, and grouping of two or more candidates for board membership is forbidden.[36] The ballot must designate the term for which each person is a candidate (full term or unexpired term of certain length).[37] After the names of candidates for any term, there must be provided as many ruled blank spaces as there are members to be voted for.[38]

It is evident from the decisions that failure to observe certain of these conditions, due to errors in printing or other unintentional omissions, would invalidate the result of the election, but in other cases would not. For example, the alphabetical arrangement of names and the prohibition concerning grouping of names are mandatory at all times:

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[30] See Chapter VIII, pp. 232, 233–234, 238, 239.

[31] Code, Sec. 119, 142.

[32] Code, Sec. 120 (7).

[33] Code, Sec. 120 (18).

[34] Code, Sec. 120 (11).

[35] Code, Sec. 120 (7) and (18).

[36] Code, Sec. 120 (7).

[37] Code, Sec. 119.

[38] Code, Sec. 120 (9).

> Since the arranging of the names in groups or without regard to the alphabetical requirement could affect the result of the election, the failure to comply with the statute is in the opinion of the Commissioner prejudicial to the rights of the candidates and constitutes sufficient cause to invalidate the election for members of the board of education.[39]

Whether failure to add the statutory number of ruled blank spaces following the names of candidates would have a similar effect would depend upon circumstances:

> It is the opinion of the Commissioner that the latter provision [requiring ruled blank spaces] would not invalidate an election unless from an examination of the ballots it appeared that the lack of space might have affected the vote.[39]

B. Nomination of Candidates for Board Membership

Names of candidates for board membership are to be printed on the official ballot only when nominated in the legal manner by petition of at least 10 qualified voters of the district. This petition must state that the person endorsed is legally qualified to be elected, and must be accompanied by a certificate from the person endorsed, stating that he is qualified to be elected, that he consents to stand for office, and that if he is elected he will accept and qualify therefor. If he fails to file this certificate of acceptance, his name cannot legally be printed on the ballot. The petition must, furthermore, be sworn by one of the petitioners, stating that the endorsers are legal voters. It must be addressed to the clerk, and must be filed with him at least five days before the date of the annual election. If the petition is defective, the district clerk must notify the candidate in order to permit it to be amended prior to the date for printing the ballot.[40] In such case it is incumbent upon the candidate to return the petition to the district clerk, if he believes his petition to be without error, together with a statement of his reasons for so believing, if he desires his name to be placed upon the ballot.[40] If this were done,

> * * * it would have been the duty of the district clerk to have the name placed on the ballot and failure to do so would constitute sufficient cause

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[39] In the Matter of the Conduct of the Annual School Election in the Township of Ocean, Monmouth Co., State School Report, 1929, p. 90, decision of Com. of Ed., Mar. 13, 1929.

[40] Code, Sec. 120 (2-9).

> to declare the election void; but having failed to return the petition, the appellant has lost any right to have the election set aside.[41]

If it is found that the petition has been improperly sworn, this will cause the placing of the name of the candidate upon the ballot to be illegal, and will invalidate the result.[42]

If the ballot contains a proposal or proposals requesting appropriations for current expenses or for capital outlay, or other questions for decision by the voters, each proposal must be stated separately, with appropriate blanks in which the voter may indicate whether he desires to vote for or against such proposal.[43] Further requirements concerning proposals requesting appropriation of school funds are discussed in the chapter on "Finance."[44]

VI. THE CONDUCT OF THE ELECTION

A. Length of Time Polls Shall be Open

The law states that

> * * * the polls for the said election shall be opened at such time as the board of education may designate between the hours of two and nine P. M., and shall remain open at least two hours, or as much longer as may be necessary to poll the vote of the district; provided, however, that in all municipalities affected by this act having a population, according to the most recent census, in excess of five thousand inhabitants, the polls must be open between the hours of seven o'clock P. M., and nine o'clock P. M.[45]

The earlier act of 1916, provided that "the polls for such election shall remain open one hour and as much longer as may be necessary to enable the legal voters present to cast their ballots."[46] A decision which was made upon this provision would seem applicable in large measure to the later act also. In the Somerville election in 1922, the chairman of the meeting, at the expiration of one hour of voting, ordered the doors closed and directed a police officer to refuse admission to about 25 voters who were still outside the building, although he permitted those already within to vote. The decision of the Commissioner said:

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[41] Potter v. Board of Education of Township of New Hanover, State School Report, 1927, p. 127, decision of Com. of Ed., May 2, 1927.

[42] In the Matter of the Review of the Annual School Election in the Borough of Union Beach, Monmouth Co., State School Report, 1929, p. 95, decision of Com. of Ed., Apr. 19, 1929.

[43] Code, Sec. 120 (18), 143, 149.

[44] See Chap. VIII, pp. 230–231, 235–237, 241–242.

[45] Code, Sec. 120 (13), P. L. 1928, Chap. 171, as amended P. L. 1929, Chap. 272.

[46] Code, Sec. 119.

> It is the opinion of the Commissioner that the Chairman of the meeting gave a too literal construction to the school election law, which reads that the polls at such election shall be kept open for one hour and as much longer as may be necessary to enable the legal voters present to cast their ballots. A more liberal view of this provision should be taken. The law evidently should be construed as meaning that the polls should remain entirely open to the public until such time as all present have cast their ballots. Persons desiring to vote cannot in the opinion of the Commissioner be legally denied admission to the building while the polls remain open to those within.[47]

Since the act of 1929 now in force does not set any definite hour for closing the polls, it seems altogether probable that the ruling made in this decision is still applicable, and that even if the board sets an hour at which time the polls are to be closed, it cannot lawfully deny legal voters the opportunity to cast their ballots because they happen to be outside of the polling place, so long as persons within are voting.

B. Organization of Meeting for Election

In order to organize the meeting, the law provides that public proclamation must be made at the voting place by a school board member or other person appointed by the board, of the opening of the meeting and of readiness to organize. Thereupon, the voters present organize by electing a chairman, a secretary, and two tellers. The chairman serves also as judge of elections.[48] No announcement of the issues of the election is necessary:

> It is not necessary that at a meeting of the legal voters called to vote on a proposition to purchase land, erect a schoolhouse, and issue bonds, the resolutions stated in the notice should be read and a formal motion made that they be adopted.[49]

Nor does a legal voter have any ground for complaint when he is denied an opportunity to speak upon the issues involved:

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[47] Long v. Board of Education of Somerville (In *MSS.*), decision of Com. of Ed., Feb. 23, 1922.

[48] Code, Sec. 120 (14).

[49] Krug and Ellison v. Board of Education of Township of Woodbridge, State School Reports, 1912, p. 109, decision of Com. of Ed.

> A school district meeting is an election and not a meeting in the ordinary meaning of that word.[49]

C. Checking the Voters

As was indicated previously, the list of qualified voters includes those on the registry list for the last preceding general election, and those whose names are on the supplementary list who were registered by the district clerk or by a board member on the Saturday preceding the annual school election.[50] The county clerk is required upon application to turn over to the district clerk the municipal registry lists for the district in which the election is to be held, and such lists are to be returned within two days after the election.[51] The secretary of the election is required to keep a poll-list and to record therein the name of each person voting.[52]

D. Marking of Ballots

While the law states that the ballots are to be numbered,[53] this has not been interpreted to mean a requirement that they be distributed consecutively according to number:

> The latter statute [Chapter 211, P. L. 1922], which is not specific in many details for the conduct of the election, while providing for numbering the ballots which might be taken as an indication that they were intended to be distributed consecutively, may be searched in vain for any definite provision regulating the exact manner of distributing the ballots.[54]

The ballots are to be marked in secret, and the Board of Education may either furnish booths or must provide other accommodations where voters may mark their ballots "without undue publicity."[55]

In marking his ballot, the responsibility is upon the voter to perform this act correctly according to law:

> A voter is supposed to know the law, and when he casts his ballot he is presumed to know what he is doing.[56]

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[50] See this Chapter, p. 153.

[51] Code, Sec. 141, 120 (12).

[52] Code, Sec. 119, 142.

[53] Code, Sec. 120 (9).

[54] Rock v. Washington Township, Morris Co., Board of Education (In *MSS.*), decision of Com. of Ed., June 29, 1923.

[55] Code, Sec. 120 (13), 149.

[56] Comly and Roome v. Board of Education of Pequannock Township, State School Report, 1913, p. 223, decision of Com. of Ed., Apr. 7, 1913.

It is not a violation of law when assistance is rendered by election officials or by other persons to those who are unable to mark their own ballots:

> There is, in the Commissioner's opinion, no violation of law involved in the assistance by other than election officials of those persons unable to mark their ballots. Nowhere in the law controlling and regulating school elections is there any requirement that only election officials may assist those who are unable to mark their ballots without aid.[57]

It is not illegal for a voter to write in or paste in a blank space the name of a person for board membership, whose name does not appear upon the printed ballot:

> While Chapter 211, P. L. 1922, definitely limits to those duly nominated by petition the candidates entitled to the advantage of having their names printed upon the official ballot and provides that "no candidate who shall have failed to file a certificate of acceptance shall have his name printed upon said ballot," there is no provision in the statute against the exercising of an individual choice by a voter through the writing in or pasting of the name of a candidate upon the ballot.[58]

E. Counting the Ballots and Determining Legality of Ballots and Votes

The law provides that immediately after the close of the polls the election officers shall count the votes for the candidates and proposals. The counting is to be conducted by the tellers in the presence of the chairman and is open to the public.[59] It becomes the duty of the election officials to determine whether any ballots or parts of ballots are illegal, and if so to discard them wholly or in part as the situation may require. Illegality may also be determined upon an appeal by any interested candidate or voter to the Commissioner of Education.

1. Illegal ballots.

   Ballots may be illegal either in part or in whole, and are rendered so by failure in some respect to conform to the specifications laid down by law concerning their form. Examples of illegalities in the ballots are as follows:

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[57] Greer v. Board of Education of Borough of Caldwell, State School Report, 1924, p. 271, decision of Com. of Ed, June 23, 1924.

[58] In the Matter of the Election for Members of the Board of Education of the Township of Hillsborough, Somerset Co., State School Report, 1927, p. 108, decision of Com. of Ed., June 9, 1927.

[59] Code, Secs. 119, 120 (15).

(a) Failure to arrange the names of candidates for board membership in alphabetical order.[60] This will invalidate the entire ballot.

(b) Placing on ballot the name of a person whose petition of nomination was not properly sworn. This causes the name of such person to be placed on the ballot illegally and makes illegal all votes cast for him.[61]

(c) Placing on ballot the name of a candidate who fails to file his certificate of acceptance.[62] This also causes his name to be placed on the ballot illegally and renders illegal all votes cast for him.

2. Legal and illegal votes.

It is not possible to determine in any general way all the causes which render votes cast illegal, since in many cases circumstances or accompanying details must be considered. The following may be stated, however, as applicable to all situations:

(a) Votes cast by persons not qualified as legal voters are illegal.[63]

(b) Ballots cast after the ballot boxes are legally closed are not legal votes.[64]

(c) Ballots marked throughout in a manner otherwise than as specified by law are entirely illegal.[65]

In some cases a vote in a certain part of the ballot may be illegal, and the rest of the ballot be legal and acceptable.

(a) If part of a ballot is illegally marked, that part only should be thrown out—the remainder should be accepted.[66]

(b) Placing a paster on a ballot over the name of a candidate instead of in a blank space provided in order to insert the name of a candidate not on the printed ballot does not justify the rejection of the ballot entirely, since the votes for the other candidates should be counted:

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[60] In the Matter of the Ocean Township Election. See footnote 39 *supra.*

[61] In the Matter of the Union Beach Election. See footnote 42 *supra.*

[62] Code, Sec. 120 (9).

[63] Code, Sec. 120 (12), and P. L. 1930, Chap. 169.

[64] In the Matter of the Conduct of the Annual School Election in the Township of South Brunswick, State School Report, 1928, p. 73, decision of Com. of Ed., Mar. 15, 1928.

[65] Code, Secs. 120 (9 and 18), 149.

[66] In re Recount of the Ballots at the Annual School Election in the Borough of Englewood Cliffs (In *MSS.*), decision of Com. of Ed., Mar. 27, 1930.

> When an election law is not specific, the voter is doubtful about the procedure to be followed. Such confusion should not cause his ballot to be declared void, if there is shown an intent to cast a valid vote.[67]

The decision in this case did not attempt to show whether the vote attempted to be cast for the one whose name was on the paster was legal or not.

(c)

> Where ballots are marked so as to be observed by others or where assistance is given in marking by other than officials, such votes should be considered illegal votes.[68]

The following have been specifically declared not to indicate illegal votes:

(a) When ballots are otherwise legally marked, they are not invalid if lines are drawn through names of other candidates, or if other marks have been made and erased.[69]

(b) If a part of a ballot is illegally marked, the part which is legally marked should be accepted as legal.[70]

(c) Minor markings, which are not significant, should not cause the rejection of the ballot:

> It is the opinion of the Commissioner that the election officials erred in not counting the ballots which contained a cross opposite the word "Yes" or "No" even though other minor markings appeared.[71]

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[67] Shearn v. Board of Education of Borough of Middlesex (In *MSS.*), decision of Com. of Ed., Mar. 11, 1931.

[68] In the Matter of the Conduct of the Annual School Election in the Township of Mendham, Morris Co., State School Report, 1929, p. 87, decision of Com. of Ed., Mar. 28, 1929.

[69] In re Recount of Annual School Election Ballots, School District of Woodridge Borough (In *MSS.*), decision of Com. of Ed., Mar. 27, 1930. Also in re Recount of Ballots, Borough of Maywood (In *MSS.*), decision of Com. of Ed., Mar. 27, 1930.

[70] In re Recount of Annual School Election Ballots, Borough of Englewood Cliffs (In *MSS.*), decision of Com. of Ed., Mar. 27, 1930.

[71] Winne v. Board of Education of Hasbrouck Heights (In *MSS.*), decision of Com. of Ed., July 25, 1930.

(d) The fact that a candidate was interested in a contract with the board of education did not render votes cast for him illegal.

> The application of the law is a matter subsequent to election regardless of its effect upon membership on the board.[72]

VII. REPORTING THE RESULT OF THE ELECTION

After the counting of votes is completed, the tally sheet of the tellers must be signed by the chairman and tellers and all official papers and ballots are delivered to the district clerk together with a statement of the results, signed by the chairman and the secretary. The chairman or judge of elections is required to announce publicly the result of the vote. If there is more than one voting place, the district clerk is required to combine the reports from the various polling places, and to announce the result from the entire district. The district clerk must within five days after the election forward all the official papers and ballots under seal to the county superintendent who is required to preserve them for one year.[73] In case the election has been one held in two or more districts upon the question of the consolidation of the districts, the county superintendent is required to notify each board concerned if the result favors consolidation.[74]

VIII. CONTESTING THE ELECTION

When an election has been held upon the question of a bond issue, any appeal from the result must be taken within 20 days after the election.[75] The manner in which this is done is indicated in the following:

> The only way in which such a proceeding can be instituted is by filing a petition or notice and making service thereof upon the Board of Education.[76]

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[72] In the Matter of the Conduct of the Annual School Election in the Township of Washington, State School Report, 1929, p. 91, decision of Com. of Ed., Mar. 25, 1929, affirmed by St. Bd.

[73] Code, Secs. 119, 120 (15 and 16).

[74] Code, Sec. 160.

[75] Code, Sec. 151.

[76] Mundy v. Board of Education of Borough of Metuchen, State School Report, 1926, p. 56, decision of St. Bd., Apr. 3, 1926, affirming decision of Com. of Ed., Jan. 25, 1926.

The school law specifies no time limit within which an appeal on an election concerning other matters than a bond issue must be taken.

Those appealing against the result of a school election naturally seize upon any and all irregularities or informalities, however minor in degree, as well as upon more important and gross violations of the law, in order to overturn the election. The Commissioner is not inclined to interfere with the results of the election as reported unless there is strong evidence of some condition that will justify such an investigation:

> The will of the people, as expressed in an election, should not be lightly set aside; and * * * before there is a recount, there should be some evidence that there was more than a probability of an illegal election.[77]

An election may be contested and set aside or the result altered because of fraud, gross irregularities, or reception of illegal ballots. The basic question in any case, in the light of the decision just quoted, seems to be concerning the effect which the conditions charged or proven have upon the result:

> An election should not be set aside unless the evidence of fraud or irregularity is such as to cast a doubt upon the result.[78]

Grounds deemed sufficient for declaring an entire election invalid are in part as follows:

A. Calling of meeting without authority of board.

B. Failure to give public notice.

> A special school tax, ordered by a special meeting of the voters, which was not called by the board of trustees, and of which the district clerk did not give notice, will be set aside.[79]

C. Failure to give the full ten days' notice of the election.

> A tax levied to raise a sum of money ordered at * * * a meeting whereof ten days' notice was not given, must be set aside.[80]

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[77] Bembridge et al. v. Board of Education of Borough of Roselle Park, State School Report, 1913, p. 230, decision of Com. of Ed., Apr. 14, 1913.

[78] Comly and Roome v. Board of Education of Pequannock Township, State School Report, 1913, p. 223, decision of Com. of Ed., Apr. 7, 1913. See also In the Matter of the Annual School Election in the Borough of Tuckerton, Ocean Co., State School Report, 1928, p. 68, decision of Com. of Ed., Mar. 2, 1928.

[79] Apgar v. Van Syckel, 46 N. J. L. (17 Vr.) 492.

[80] Canda Mfg. Co. v. Woodbridge, 58 N. J. L. (29 Vr.) 134.

D. Reopening ballot boxes after they are officially closed, to permit casting of additional ballots:

> The reopening of the ballot box and the continuance of voting by those who were not present during the time designated in the notice calling the election is in the opinion of the Commissioner a gross violation of the law governing school elections [and] the * * * school election * * * is accordingly set aside.[81]

The reception of illegal votes is admissible as grounds for declaring an election void only when the number of illegal votes is such as to change the result of the election.[82] In case of the election of board members this may result in invalidating the election of one board member, but in not affecting the others elected. The election of any person as member is invalidated when the number of illegal ballots exceeds his plurality.[83] In case a certain number of ballots are illegal because those who cast them were not qualified to vote, it is not possible to reject any particular ballots in order to make a recount:

> This would necessitate knowing how each of such illegal voters cast his ballot. Inquiry of this kind the Commissioner of Education is without authority to make.[84]

Instances of irregularities in school elections which were held insufficient to justify declaring the election void, are:

A. Posting one of the seven notices of the election less than ten days before the election, when the number of votes cast indicated that the public notice had sufficiently advertised the election.

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[81] In the Matter of the Annual School Election in the Township of South Brunswick, State School Report, 1928, p. 73, decision of Com. of Ed., Mar. 15, 1928.

[82] Ryan v. Board of Education of Hamilton Township, decision of Com. of Ed., Jan. 4, 1917, in State School Report, 1917, p. 288, affirmed by St. Bd., Apr. 7, 1917, in State School Report, 1918, p. 389; Greer v. Caldwell Board of Education, State School Report, 1924, p. 271, decision of Com. of Ed., June 23, 1924; In the Matter of the Protest Against the Election of Members of Board of Education of the Borough of Keansburg, State School Report, 1925, p. 249, decision of Com. of Ed., Apr. 14, 1925; Coriell et al. v. Board of Education of Township of Passaic, State School Report, 1925, p. 258, decision of Com. of Ed., Jan. 25, 1925, affirmed by St. Bd., Apr. 4, 1925; McIntire et al. v. Board of Education of Township of Elk, State School Report, 1926, p. 43, decision of Com. of Ed., Apr. 6, 1926.

[83] Review of the Annual School Election in the School District of Middle Township (In *MSS.*), decision of Com. of Ed., Apr. 3, 1930.

[84] Ryan v. Board of Education of Hamilton Township. See footnote 82 *supra.*

B. Appointing only one teller instead of two for the ballot boxes, when there was no evidence or suspicion of fraud.

> Such irregularities are not of sufficient gravity to justify setting aside the will of the people expressed at such election so clearly and by such a majority, and thus placing in the hands of the county superintendent of schools the filling of vacancies which the people by law are directed to fill.[85]

C. Failing to check names of persons voting with those on municipal registry list of the last preceding general election, where there is no proof that unregistered persons voted.[85]

D. Placing names of persons coming of age on the supplemental registry list by the district clerk on a different day than that designated by law.[86]

E. Election officer making changes in names on poll list after the election, but prior to forwarding the list to the county superintendent.[86]

F. An insufficient number of official ballots may not invalidate the election.

> It is the opinion of the Commissioner that in the case of insufficient ballots the will of the people as expressed by the ballots cast should not be affected, unless the number of people denied ballots equals or exceeds the plurality of any of the candidates who received the highest number of votes for the vacancies to be filled.[87]

IX. Additional Considerations

In any appeal to contest a school election, it is useless to rely upon general election laws:

> Neither in the opinion of the Commissioner can the general election law be invoked in any particular in determining any question relative to school elections, since the latter are controlled by a separate system of legislation.[88]

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[85] In the Matter of the Election for Members of the School Board of North Hanover Township, State School Report, 1921, p. 317, decision of Com. of Ed., June 21, 1921.

[86] In the Matter of the Keansburg Election Protest. See footnote 82 *supra*.

[87] Review of Annual School Election and Count of Ballots in Lacey Township, Ocean Co. (In *MSS.*), decision of Com. of Ed., Mar. 27, 1930.

[88] Coriell et al. v. Board of Education of Township of Passaic. See footnote 82 *supra*.

In order to determine legality of votes, a voter cannot be compelled to disclose how he voted as in general elections:

> Under the law applying to school elections there is no provision that a person voting illegally may be required to testify as to how he voted as is provided for in the case of general elections (Chapter 187, P. L. 1930).[89]

In case of a tie vote for any position as board member, when no other candidate for that position receives a plurality of votes, the result is a failure to elect, and the county superintendent is required to appoint a member to serve until the next annual election.[90]

X. SUMMARY

The school meeting or election in the Article VII school districts is one of the most characteristic features of the New Jersey state system of schools. It possesses the virtue of enabling the voters to have a direct control over school policies, and therein, possibly, lies one of its greatest weaknesses. So far as the control which it exercises over the annual budget is concerned, its worth is determined by the degree of enlightenment and by the disinterestedness of the electorate. In its direct control over the issuance of bonds, it conforms with general practice.[91] In the third field of its operation, the election of school board members, it may be criticized chiefly because of the frequency of its occurrence. In a three-member board, one member is elected annually; where the board consists of five members, two are elected in each of two successive years and one the third year; while in the nine-member board, three are elected annually. It is evident that the voters are able to change the policies of the board, if they so desire, in a two-year period, whatever the size of board. To some, this will seem a virtue. In any particular instance, it must again be noted, the result will depend largely upon the intelligence of the people, and upon the ability of those selected to serve.

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[89] DuBois v. Board of Education of Township of Raritan, Middlesex Co. (In *MSS.*), decision of Com. of Ed., Apr. 8, 1931.

[90] In the Matter of the Recount of Ballots Cast at the Annual Election in the Township of Lebanon, Hunterdon Co., State School Report, 1929, p. 94, decision of Com. of Ed., Mar. 6, 1929.

[91] Smith, James H.: *Legal Limitations on Bonds and Taxation for Public School Buildings.* Teachers College, Columbia University, Contributions to Education, No. 453. Bureau of Publications, Teachers College, Columbia University, New York City, 1930, pp. 108–110.

The New Jersey school election is fortunately held at a separate time from the general elections, and, equally fortunately, is held in school buildings, and its machinery is as far divorced from municipal politics as seems possible. It is interesting to note in a review of the election cases appealed that comparatively few of them suggest in any way the existence of dishonest practices. The decisions are furthermore effective in discarding nonessential considerations in the appeals, and tend, where possible, to give the utmost weight to the expressed will of the people, rather than to thwart that will by permitting technicalities and minor irregularities to becloud the issue of greater importance.

CHAPTER VII

CONTRACTS IN PUBLIC SCHOOL BUSINESS

I. INTRODUCTION

In the conduct of public school business, whenever supplies or equipment are to be purchased or buildings are to be constructed or repaired, or work or services involving any considerable expenditure is to be performed, the question of a contract to cover such operations becomes an important one. The first consideration would be whether a contract is required; a second, if one is required, would concern its form and content; a third, the necessary steps prescribed by law in order to make a contract and to carry it out; a fourth, the responsibilities and liabilities assumed by the parties to the contract. These, and similar considerations, will form the discussion of this chapter. While the material will refer to contracts of municipalities and of school districts, which have been held in New Jersey to be municipalities,[1] the same principles generally apply to contracts entered into by the state or its boards or agencies, or to the counties and their boards.[2] In this chapter, reference will not be made to teachers' contracts, since those are discussed in the chapter on "The Legal Status of Teachers, Supervisors, and Principals."[3]

II. THE GENERAL NATURE OF MUNICIPAL CONTRACTS AND ESSENTIAL STEPS

A. Contracts of municipal bodies are in general governed by the same legal principles as those of private persons:

> Contracts of a corporation, whether municipal or private, stand on the same footing with contracts of natural persons.[4]

B. In the New Jersey Statutes, a contract may mean a mere agreement:

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[1] See Chapter V, p. 77.

[2] Code, Sec. 689.

[3] See Chapter X, pp. 286–293.

[4] Jersey City v. Harrison, 71 N. J. L. (42 Vr.) 69, 58 A. 100.

> As used in Crimes Act, § 32, the word "contract" is used in the popular sense of a mere agreement, rather than in the technical sense of an agreement on consideration enforceable at law.[5]

C. While the statutes do not prescribe in all cases that contracts shall be in writing, the presumption to that end is strong in the case of municipal corporations handling public business:

> The rule that a contract does not become complete and binding until reduced in writing and signed, if it appears that such was the intention of the parties, is especially applicable to a case, when one of the parties is a municipal corporation dealing with municipal property.[6]

D. A contract made by a board of education is the contract of the school district:

> A municipal board in making a contract for the erection of a municipal building, acts as the agent of the municipality, and the contract into which it enters is the municipality's contract.[7]

E. The essential steps in forming and carrying to completion a contract by a school board would seem to be:

1. Authorization of project or purchase by the board of education, and of the procuring of estimates;
2. The preparation of plans and specifications (list of materials, description of service to be performed, etc.), and, when required by law, their approval by the body to whom that function is assigned;
3. Where such is required, the advertisement for bids;
4. Receipt and consideration of bids, if required by law;
5. The award of the contract by the board;
6. The performance of the work or services by the contractor, or the furnishing of materials or supplies contracted for;
7. The acceptance or rejection of the work, services, supplies, or materials, and payment of the contract price upon completion.

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[5] State v. Kuehnle, 85 N. J. L. 220, 88 A. 1085, affirming judgment 84 N. J. L. 164, 85 A. 1014.

[6] Hudson v. Atlantic City, 103 N. J. L. 121.

[7] Arzonico v. Board of Education of Town of West New York, 75 N. J. L. 21, 69 A. 450.

Not all of these steps are required in all types of contracts. The first three steps named are less frequently required than the last four, all of which are essential in any contract, as will be shown in the discussion which follows.

III. THE SPECIFICATIONS AND PLANS

The school law contains no provision concerning specifications for school supplies, beyond the mere mention of them in connection with the awarding of bids. The specifications in the case of such supplies would undoubtedly be the list of such supplies as needed, together with any description necessary to guide the bidders intelligently in making proposals, and purchasers in checking deliveries.

In the case of school building operations or repairs, plans and specifications are prepared by such officer of the board as may be appointed for that purpose, usually an architect or engineer. If an Article VI district has a business manager, he is charged with drawing them up or supervising such work.[8] The law provides that upon the request of the Commissioner of Education, the Commissioner of Charities and Corrections shall cause to be prepared standard plans and specifications for school buildings of different size up to twenty-four rooms, and that copies of these shall be made by the Commissioner of Education and loaned to any district applying.[9] The authority of a board to employ an architect to prepare plans and specifications for a building is limited by the funds provided:

> Since the powers of a board of education are statutory only, and it can make no valid contract for the building of a schoolhouse or the expenditure of public moneys for any object connected with the proposed building of the schoolhouse, except as that contract is supported by statutory authority, it has no power to employ an architect to prepare plans for a building that would not exceed in cost for general construction, excavation, and rough grading $400,000, when only $200,000 has been appropriated for the purchase of high school sites, procuring plans and specifications, and for high school construction.[10]

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[8] Code, Sec. 93.

[9] Code, Sec. 198.

[10] Perkins v. Newark Board of Education, 161 Federal Reporter 767 (1908).

The plans and specifications for any construction work on schoolhouses or other school buildings, or in fact any building to be altered, repaired, or built by any other public body, such as a county board for vocational education, or the State Board of Education, when the entire cost of construction will exceed $1000, must be divided into five parts and advertised accordingly. These parts are:[11]

A. general construction work;
B. plumbing and gas fitting and kindred work;
C. heating and ventilating equipment; steam power plants and kindred work;
D. electrical work;
E. structural steel and ornamental iron work.

This division of the specifications has been held to be mandatory in its entirety. In 1926, the board of education of the borough of Seaside Park had advertised for and received bids on general construction, together with plumbing work as one part, and upon heating, ventilating, and electrical work as a second part, a procedure not in accordance with law. The board then discovered its error, and before attempting to award any contracts, rejected all bids and, after properly separating the parts of the specifications, and making certain other changes, proceeded to readvertise for new proposals. One of those whose bid had been rejected, appealed, and the following statement was made by the Commissioner in his decision:

> The Commissioner cannot agree with Appellant's contention that Chapter 95, P. L. 1915, which requires separate plans and specifications and separate advertisement for bids for the several branches of public building construction work, is merely permissive in its provisions. It is his opinion that such provisions are absolutely mandatory and that boards of education have no alternative but to comply with them.[12]

The board of education may, if it so desires, delegate to a committee of the board, and, presumably, to any authorized agent of the board, the duty of preparing the specifications:

> A board of education * * * in seeking proposals for a contract to supply school furniture, may delegate to a committee the duty of prepar-

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[11] P. L. 1931, Chap. 364. See also Code, Sec. 199.

[12] Clatts v. Board of Education of Borough of Seaside Park, S. L. D., p. 12, decision of Com. of Ed., Apr. 6, 1927.

ing and submitting specifications, and of conducting negotiations for the contract, provided the proposals and the result of the negotiations are considered by the board before the award of the contract.[13]

The courts have laid down a general principle to be applied in determining the adequacy of specifications:

> Specifications for work and material called for by a municipal improvement are sufficient if bidders are informed as to the nature, quality and quantity of the work and materials to be furnished, and the same information is furnished to all, so that there may be intelligent and competitive bidding, and a binding contract may result therefrom.[14]

A board cannot permit bidders to supply their own plans and specifications:

> Where a public board, required to award a bid to the lowest responsible bidder after advertisement, allows bidders to furnish plans and specifications, all bidders were not made acquainted with the specifications in their entirety, and the opportunity to bid afforded by definite specifications, open to all bodies, was not given.[15]

The specifications, as indicated in the decision just quoted, must be the same for all bidders:

> There is no competition among bidders for municipal work as to the price, unless the work is the same for all bidders in all its general particulars, including the length of time allowed for the work.[16]

In the specification of time limits for the completion of the work, boards sometimes have requested bidders to estimate the time needed. The court has decided that where bidders on public work are not given a specific time in which the work is to be done, but are asked to estimate the time necessary to complete the work, no common standard for its completion is set up, and a board of education cannot award a contract for such work to another than the lowest bidder because he estimates a longer time as necessary for performance of the work.[17] In case the board does not specify any time limit, the following rule holds:

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[13] Kraft v. Board of Education, 67 N. J. L. (38 Vr.) 512, 51 A. 483.

[14] Schwitzer v. Board of Education of City of Newark, 79 N. J. L. 342, 75 A. 447.

[15] Kay v. Board of Education of Kearny, 83 N. J. L. 551, 83 A. 954.

[16] Armitage v. Newark, 86 N. J. L. 5, 90 A. 1035.

[17] Homan v. Board of Education of Camden, 3 N. J. Misc. Rep. 301.

> When the specifications for bids upon public work do not require the work to be done within a specified time, the implication is that the work is to be done within a reasonable time.[18]

It has been ruled by the courts that it is legal to ask in the specifications for separate bids on alternative projects:

> Specifications otherwise sufficient are not objectionable because requiring estimates from prospective bidders for municipal work on certain alternatives therein named.[14]

Similarly, a board may ask for both unit price bids and for lump sum bids, if it so desires:

> Where both unit price bids and lump sum bids are invited the lump sum bid is not open to attack upon the ground of lack of a common standard for competition where the plans and specifications set up a common standard as to the structures to be built, the quality of the work and the class and character of the materials to be used, and provide for no change in the standard set up for unit price bids over that set up for lump sum bids.[19]

Frequently, where a board desires to purchase a particular piece of equipment, or to specify a certain type of material, on account of its desirable qualities or performance, the equipment or material is protected by patent, and it becomes a question as to how to specify its needs and still not preclude competition. In the case of Petterson v. Board of Education of Union City, the board decided to specify a certain type of oil burner for its heating plant. In a contest which followed the legality of this specification was attacked; but the court held:

> Without entering into a detailed statement of the legal reasons applicable to the situation, I may say that the case is governed by the recent adjudication in the Supreme Court of Hahn Motor Truck Corp. v. Atlantic City, involving the purchase of a fire engine. This case involves the purchase of an oil burner, but the legal rule applicable to the situation is aptly and accurately stated by the Supreme Court in the case referred to.[20]

Turning to Hahn Motor Truck case, we find that a portion of the decision of the Supreme Court reads as follows:

> It seems to us that the provisions of the * * * statute are not applicable to the purchase of fire apparatus. One who furnishes apparatus

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[18] Phifer v. Bayonne, 105 N. J. L. 524.
[19] Deininger v. Englewood Cliffs, 103 N. J. L. 297.
[20] Petterson v. Board of Education of Union City, 6 N. J. Misc. Rep. 374.

> is not furnishing materials and supplies in the sense these words are used in the statute. No city could draft specifications for fire apparatus which would apply to all fire apparatus of the kind desired. There can be no standard specifications for such apparatus. Each manufacturer makes his apparatus under patents, processes or designs different from that of other manufacturers. It is these differences which support the claim of the superiority of apparatus made by each manufacturer over that manufactured by his competitors. We think a city purchasing fire apparatus has some discretion, within proper limits, as to the apparatus which it will purchase. Hammonton v. Elvins, 101 N. J. L. 38.[21]

A decision containing the same principle is as follows:

> As against objection that it prevents competition between bidders, a city acting in good faith, in specifications for a pavement, can restrict the use of materials to those manufactured by a particular firm, or owned by a patentee.[22]

The good faith of the board in such a case is the most necessary condition to the legality of such specifications:

> Where proposals * * * calling for competitive bidding are purposely so framed that under the circumstances they deter rather than invite bona fide competition by calling for a certain patented article which only one paving company has the right to use, an award to the intentionally favored bidder will be set aside.[23]

Frequently, and probably almost invariably, school boards insert a clause in their advertisement reserving the right to reject any or all bids. The following decision, while referring to a common council, would seem to give a board of education the right to reject all bids in order to change its specifications, even if that clause were not in the advertisement:

> Where the common council decides to change the terms of the advertised competition for public work, it may reject the bids received thereunder and re-advertise but cannot award a contract to one not the lowest bidder.[24]

There are likewise certain legal requirements concerning the character of the plans and specifications. The Rules and Regulations of the State Board of Education require that all plans and specifications for school construction work must embody the requirements of the Building Code as established by that board, "in order that the contractors estimating on the work will be fully informed as to the quality of material which will be approved."[25]

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[21] Hahn Motor Truck Corp. v. Atlantic City, 6 N. J. Misc. Rep. 234.
[22] Milner v. City of Trenton, 80 N. J. L. 253, 75 A. 939.
[23] Johnson v. Atlantic City, 82 N. J. L. 204, 81 A. 1105.
[24] Armitage v. Newark. See footnote [16] *supra*.

Furthermore, the School Law has established provisions governing the approval of plans and specifications. In the first instance, they must be approved by the local board of education.[26] In the second place, they must be submitted to and approved by the State Board of Education, and after such approval has been given, no change must be made in them by local school authorities or agents unless this also is submitted to that body and approved.[27] The school law specifically provides, however, that the local board shall not be required to submit its plans and specifications to the local municipal authorities for approval, nor to secure local building permits.[27]

IV. Advertising and Securing Proposals

The law prescribes very carefully the procedure for purchasing school supplies or for entering into contracts for school construction work, and is very specific in the matter of advertising for proposals. In respect to school supplies, it requires that each board of education

> * * * shall prior to the beginning of each school year, cause advertisement to be made under such regulations as it may provide, for proposals, for furnishing supplies required in the schools and by said board during the ensuing year. If other and further supplies shall be required during the year, they shall be purchased in like manner.[28]

As concerns contracts for building construction, the requirement is that

> * * * no contract shall be entered into for the building of a new schoolhouse or for the enlarging or repairing of a schoolhouse already erected, except after advertisement made under such regulations as said board may prescribe.[28]

There are several exceptions named in the same section of the law as not requiring advertising for proposals:

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[25] Rules, Building Code, No. 81.
[26] Code, Sec. 93.
[27] Code, Sec. 200.
[28] Code, Sec. 66, and P. L. 1930, Chap. 48.

A. purchasing supplies to an amount not exceeding $250;
B. purchasing textbooks;
C. purchasing kindergarten materials;
D. ordering repairs to school buildings to an amount not exceeding $500.

It has furthermore been ruled in several cases by the Commissioner of Education that boards of education are not required to advertise for proposals in the case of contracts for transporting pupils:

> There is no provision of law in this State by which a board of education is required to advertise for bids in the matter of awarding school transportation contracts or to award such contract to the lowest bidder even though such advertisement be made.[29]

In the section of this chapter concerning plans and specifications, it was shown that the law requires, under certain conditions, a classification of the specifications for building into five divisions, namely, general construction work, plumbing and gas fitting, heating and ventilating, electrical work, and structural steel and ornamental iron work.[30] It is a requirement of the law that advertisement be made for proposals for each of these types of work separately, the responsibility for this duty being placed upon the board of education as the board or body authorized by law to award contracts.[31]

The procedure to be followed in advertising and securing proposals is specified in the law as follows:[32]

A. The board or the authorized committee is required to state in the notice the time and place when such bids shall be received;
B. At the time and place stated in the public notice the board or committee, being in session, shall receive the bids, and

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[29] Mendham Garage Co. v. Mendham Township Board of Education, S. L. D., p. 267, decision of Com. of Ed., Oct. 10, 1923. See also Leeds v. Board of Education of City of Port Republic, State School Report, 1916, p. 221, decision of Com. of Ed., Oct. 28, 1916, and Johnson v. Board of Education of Township of Readington, Hunterdon Co., State School Report, 1918, p. 198, decision of Com. of Ed., Oct. 22, 1918.

[30] See p. 174.

[31] Code, Sec. 199.

[32] Code, Sec. 689.

immediately unseal the same and publicly announce the contents in the presence of the parties bidding or their agents, if such persons choose to be present;

C. The board or committee shall thereupon make proper record of the prices and terms upon the minutes of the body;

D. No bids are permitted to be received previous to the hour designated in the public notice, and none shall be received thereafter.

While this provision mentioned committees of a board in order to locate complete responsibility for any of the acts mentioned, it did not thereby authorize committees of a board to act for it in advertising and receiving proposals. The court, however, has held that a committee of the board, when properly authorized, may perform this function:

> An award of a contract for the building of a schoolhouse made by a city board of education was not unlawful because a committee of the board duly authorized by its rules advertised for, received and opened the bids; it appearing that the committee, after opening the bids, reported to the board as a basis for its action.[33]

A public body such as a school board may make provision in its specifications to take care of any "extras" on the contract on certain terms, without the necessity for advertising for proposals for such extras:

> P. L. 1912, p. 593, providing that contracts let by a public body for doing work or furnishing materials or labor at an expense of over $500 shall be invalid without a public advertisement for bids and an award to lowest responsible bidder, does not forbid a provision for extra work, such a provision being a protection in case of modification by an unforeseen emergency, or as an incident to the work provided for.[34]

V. AWARDING THE CONTRACT

A. General Principles

In both Article VI and Article VII districts, and in fact in the case of county boards of vocational education and in all other bodies dealing with contracts for school supplies or school building construction, whenever a board is required to advertise for proposals, it is likewise required to award the contract "to the lowest responsible bidder."[35] If advertisement is not required, and no requirement exists compelling the award to the lowest responsible bidder, the board is not bound to do so, provided it acts in good faith:

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[33] Schwitzer v. Board of Education of City of Newark. See footnote 14 *supra.*

[34] Thompson v. East Orange (Err. & App.), 109 A. 340.

> Where the statute does not require the board of education to invite proposals, and award its contract for the purchase of supplies to the lowest bidder, it may, after receiving proposals, act independently of them in awarding the contract, where its power is exercised in good faith and with reasonable discretion.[36]

The importance therefore of including in the advertisement for the proposals a clause reserving the right to reject any or all bids, is evident, when the board is not required to advertise, if it expects to act otherwise than in accordance with the public notice.

In interpreting the rights of boards of education in awarding contracts for transporting pupils to others than the lowest bidder, the Commissioner and the State Board have usually relied upon the following decisions by the courts:

> The act of May 22d, 1894 (Gen. Stat., p. 2174), * * * authorizes a contract for the purposes named in the act for any term not exceeding five years to be made with or without advertisement for proposals. The contract need not be awarded to the lowest bidder, and even after advertisement and the reception of proposals it may be awarded or made independently of such proposals, so long as the power to make such contract is exercised in a bona fide manner with reasonable discretion and judgment for the benefit of the municipality.[37]
>
> Where there is no requirement in the charter of a municipal corporation or any general law requiring that contracts for street paving shall be let to the lowest bidder only, the municipal body, in awarding contracts has a large measure of discretion, and in the absence of fraud or the palpable abuse of such discretion, the courts will not set aside its action.[38]

The decision in the Mendham Township transportation case covered this point:

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[35] Code, Secs. 66, 199, 440, and P. L. 1930, Chap. 48.

[36] Kraft v. Board of Education. See footnote 13 *supra*. See also Coward v. Bayonne, 67 N. J. L. (38 Vr.) 470, 51 A. 490.

[37] Oakley v. Atlantic City, 63 N. J. L. (34 Vr.) 127.

[38] Murray et al. v. The Mayor and Common Council of City of Bayonne, 73 N. J. L. (44 Vr.) 313.

> The authorities in this State in matters of this kind hold that where there is no statutory requirement that a contract be awarded by a municipality to the lowest bidder, a municipality after inviting bids or proposals may disregard the lowest bid and award the contract to a higher bidder, providing such action is taken in the exercise of a fair discretion and with a view to the welfare of the municipality.[39]

B. Qualifications of Bidders

The question as to the qualification or disqualification of bidders has at times arisen. One of the most common qualifications is the making of a deposit at the time the proposal is submitted, as a guarantee of good faith. If such is required, and a bidder is unable to meet the requirement, the board may refuse to consider his bid. If such a bidder, after the contract has been awarded to another, finds himself able to make the deposit, he cannot require that bids be re-opened:

> The fact that a bidder who was unable to furnish the required deposit when bids for a public work were asked for, is afterwards able to comply therewith, is not ground for rescinding the contract and re-opening the bids.[40]

The fact that a board may waive this requirement in some contracts does not require it to do so in all cases:

> The fair intendment of the requirement is that the cash or check should be furnished as security that the bidder, if successful, would enter into the contract and give the statutory bond, and that such a requirement was a reasonable regulation, and the fact that it had been waived in other cases, and was waived in another contract awarded the same day, is immaterial.[41]

In another case an attempt was made to disqualify a bidder because his business partner was a member of the board awarding the contract:

> A contractor is not precluded from taking public work on his individual account because his general business partner is a member of the municipal board that awards the contract.[42]

C. The Lowest Bidder, and the Question of Responsibility

In most types of contracts, it is not difficult to determine who is the lowest bidder. In transportation contracts, however, where exact specifications are at times difficult to provide, this may be determined by other factors than the price:

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[39] Mendham Garage Co. v. Mendham Township Board of Education. See footnote [29] *supra.*

[40] Flemming v. Jersey City, 42 A. 845.

[41] Sargent v. Kearney, 23 N. J. L. J. 359, 360.

[42] Moreland v. Passaic, 63 N. J. L. (34 Vr.) 208, 42 A. 1058.

> It rests with the Board of Education to determine which bid is actually the lower by taking into consideration all conditions existing. The board of education has a right to exercise its discretion in determining the value of the service rendered by the proposed form of transportation and the proposed facilities that are to be furnished. It may appear that in actual dollars and cents one bid is lower than another, but when other things are taken into consideration, such as the character of the service offered, such bid may not after all be actually lower.[43]

What is the test of the responsibility of a bidder? In most cases, the following rules would apply:

> The test of whether a bidder is responsible is whether the bidder has the necessary equipment and financial responsibility to perform the contract, and the refusal to grant a contract to the lowest bidder on the ground that such bidder was not responsible because, in a prior contract, there had been frequent disputes in reference to the performance of that contract, is in violation of the statute.[44]
>
> To justify the governing body of a municipality * * * in rejecting the bid of the lowest bidder for a public work, there must be such evidence of the irresponsibility of the lowest bidder adduced as would justify a belief on the part of fair-minded and reasonable men that it is not for the best interest of the municipality to award the contract to the lowest bidder.[45]

In respect to the responsibility of a bidder on a transportation contract, the Commissioner of Education has said:

> A contract for the transportation of children by auto bus has in it elements that ordinary contracts do not contain. It is the custom in ordinary contracts to award the contract to the lowest responsible bidder, responsible meaning as a rule financially responsible. In the matter of the transportation of children the responsibility goes further than the mere financial standing of the bidder, * * * responsibility in caring for the proper conduct of the children on their way to and from the school.[46]

The lowest bidder must conform to the conditions advertised in order to be entitled to the award:

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[43] Goff v. Board of Education of Upper Township, State School Reports, 1920, p. 183, decision of Com. of Ed., Nov. 21, 1919.

[44] Peluso v. Hoboken, 98 N. J. L. 706.

[45] Paterson Contracting Co. v. Hackensack, 99 N. J. L. 260.

[46] Leeds v. Board of Education of City of Port Republic. See footnote 29 *supra*.

The lowest bidder within a statute requiring a municipality to award a contract to the lowest bidder, must be a bidder who conforms to the requirements in the notice to bidders, and not one who proposes a substitute not conforming to the published specifications.[47]

In case a board of education refuses to award a contract to the lowest bidder, where such is required by law, and asserts that he is not responsible, such bidder is entitled to a notice of the fact and to a hearing before the board on the point:

Under P. L. 1904, special sessions, p. 21, § 53, requiring a municipal board of education to award a contract for school supplies to the lowest responsible bidder, the board cannot determine against the responsibility of a bidder without giving him notice and an opportunity to be heard.[48]

The rights of the lowest bidder, so clearly upheld in the decisions just quoted, are not to be denied him because of mere technicalities or unimportant irregularities in his estimate:

A mere irregularity in a bid which does not injure or mislead will not justify its rejection by a municipal body charged with a duty of awarding a contract to the lowest responsible bidder when the bid appears to have been in substantial compliance with the specifications.[49]

A nominal difference between the lowest bid and the one next highest does not in any sense affect the legal requirement:

Where the statute applicable to the building of a schoolhouse provided that all contracts should be awarded to the lowest responsible bidder, and the bidder's responsibility is conceded, the board of education of a town was not justified in granting the contract to one who was not the lowest responsible bidder, on the ground that the difference between the bids was only nominal, and hence they could prefer local tradesmen. They had no discretion of the premises. But the court denied the application to change the placing of the bid, out of consideration for the public interest, leaving the prosecutor to his individual remedy against the board of education.[50]

The requirement of the law places a definite limit upon the power of the board:

The provisions of P. L. 1904, special sessions, p. 21, § 53, requiring a municipal board of education to award contracts for school supplies to the lowest responsible bidder, limits the power of the board, which must make the award to such bidder.[51]

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[47] International Motor Co. v. Plainfield, 96 N. J. L. 364.

[48] Jacobson v. Board of Education, 64 A. 609. See also Schwitzer v. Board of Education of City of Newark, footnote 14 *supra;* Kelly v. Board, 90 N. J. L. 411, 101 A. 422; Armitage v. Newark, footnote 16 *supra;* Faist v. Hoboken, 72 N. J. L. (43 Vr.) 361, 60 A. 1120.

[49] Schwitzer v. Board of Education. See footnote 14 *supra.*

[50] Sharwell v. Board of Education, 24 N. J. L. J. 436.

The board, after finding the lowest bidder not responsible, must award the bid to the one who has offered the next lowest bid, if he is responsible:

On *certiorari* by the lowest bidder to review the action of the board in failing to award the contract to the lowest responsible bidder, aside from the question as to the rights of the lowest bidder, the board was bound to show a reason for passing over one whose bid was between the highest and lowest.[51]

Failure to award the contract to the lowest responsible bidder, when such is the legal requirement, renders the officers responsible liable to a criminal charge, if the act is shown to be with evil intent:

When two persons offer to do work to be paid for by the public, of whom one, a responsible bidder, offers to do it on more advantageous terms than the other, the officer should award the contract to him; and a charge that the officer wilfully and corruptly gave the contract to the other shows a criminal offense.[52]

The fact that there may be only one bidder on a contract, does not prevent its award:

Where a bid for a municipal contract is open to the world for competition and everyone has an equal chance of success in obtaining the award, the fact that the successful bidder has no competition cannot operate to deprive the municipality of its right to award the contract.[53]

D. The Employment of Labor in Relation to the Contract

1. The rate of wages required by law.

In the Washington borough school district contract case, the decision contained important principles concerning wage rates for labor:

Chapter 253, P. L. 1913, provides: "All contracts made by or on behalf of the State of New Jersey, or by or on behalf of any county, city, township or other municipality of said State * * * for the performance of any work * * * not less than the prevailing rate of per diem wages in the locality where the work is performed shall be paid to such laborers or workmen."

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[51] Jacobson v. Board of Education. See footnote [48] *supra.*

[52] State v. Kern, 51 N. J. L. (22 Vr.) 259, 17 A. 114.

[53] Bauer v. West Hoboken, 90 N. J. L. 1, 100 A. 223.

> Chapter 242, P. L. 1931, provides: "That every contract in excess of $5,000.00 in amount, to which the State or any political subdivision thereof is a party, which requires or involves the employment of laborers or mechanics * * * shall contain a provision to the effect that the rate of wages for all laborers and mechanics * * * shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village or other civil division."
>
> Both of the above quoted laws require contractors to pay the prevailing rate of wages, and the latter makes mandatory the inclusion of a provision to that effect in all contracts made pursuant to bids which were invited after its passage. * * *
>
> Mr. Stoneback's refusal to sign the contract embodying such provision justified the Board of Education in awarding the contract to Stoudt and Company, whose officers agreed to pay the prevailing rate of wages and sign a contract drawn in accordance with the above cited statutes.[54]

2. Preferential employment of New Jersey or local labor.

Another recent act of the legislature requires that in the construction of any public work for the state or any of its political subdivisions, or any board thereof, preference in employment upon such work shall be given to citizens of New Jersey, when they are available. It is required that a provision be inserted in all contracts stating that if this act is not complied with, the contract shall be voidable at the instance of the state, county, or municipality. A check upon this practice is had by requiring the public body making contracts to file with the Commissioner of Labor the names and addresses of all contractors holding such contracts. Upon demand of the Commissioner of Labor, the contractor must furnish lists of all of his sub-contractors, and must keep a list of his employees, with information concerning their citizenship.[55]

In the Washington borough case, to which reference has just been made, the board inserted in its advertisements for proposals a provision that the contractor should agree to employ a certain percentage of local labor. On this point, the Commissioner ruled:

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[54] Stoneback and Nase Company v. Board of Education of Borough of Washington (In *MSS.*), decision of Com. of Ed., Sept. 30, 1931.

[55] P. L. 1931, Chap. 27.

> There is no law requiring a contractor to agree to employ local labor. Therefore, the refusal of appellant to consent to such employment was not in itself ground for denying the award of the contract to the Stoneback and Nase Company.[54]

E. Action of the Board Upon the Proposals

Since there is no legal requirement for a definite number of affirmative votes of members of a board in awarding a contract, it seems evident that a majority vote of those present and constituting a quorum is all that is required. The authority to award a contract cannot be delegated by a board to its officers or agents:

> By force of the 90th section of the School Law a contract for a heating apparatus to be installed in a schoolhouse can be entered into by a board of education only when the same has been presented and passed upon by the board at a regularly called meeting; it is not competent for the board to abdicate this duty by delegating to its president and clerk authority to enter into such a contract in its behalf.[56]

If the board has voted to award a contract to a certain bidder, it may for proper reasons at the same meeting of the board reconsider this action, and even award the contract to another. In the case of Tunison v. Warren Township Board of Education, which involved a transportation contract, the Commissioner ruled, in accordance with principles laid down by the courts in State v. Foster, 36 N. J. L. (7 Vr.) 107, and Whiting v. Van Buskirk, 40 N. J. L. (10 Vr.) 467, that if the person to whom a contract is first awarded is not officially informed by the board of education that the contract has been awarded to him and if there had been no public promulgation of such action, and if the board took no action inconsistent with a further review of the award, but at the same meeting proceeded to reconsider its original action, by adopting a resolution awarding the contract to another, the board was within its legal rights and the second award was legally accomplished.[57]

Where once the board has taken conclusive action on the contract, it cannot dissolve it at will:

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[56] American Heating and Ventilating Co. v. Board of Education of Town of West New York, 81 N. J. L. (52 Vr.) 423, 79 A. 313.

[57] Tunison v. Board of Education of Warren Township, Somerset Co. (In *MSS.*), decision of Com. of Ed., Oct. 21, 1929, affirmed by St. Bd., Feb. 1, 1930.

Municipality cannot rescind or dissolve its binding contract by mere resolution.[58]

If a board in its advertisement for proposals reserves the right to reject any or all bids, and has good cause for so doing, the courts are not disposed to interfere. Examples of good cause would be:

1. A decision of the board to change the plans and specifications:

   > If the board after receiving proposals under its first advertisement on January 18th, desired to make such changes in the plans and specifications as it actually did make, it was legally justified in rejecting all bids under the power reserved by it in the advertisement and in then proceeding to advertise anew for proposals upon such revised plans and specifications.[59]

   Any change in plans and specifications, however, cannot be made after bids are in, in order to secure lower bids, without readvertisement:

   > Public School Act Oct. 19, 1903 (P. L., p. 5), requires that there shall be advertisements for proposals for the building, enlargement, or repair of schoolhouses, and that no bid shall be accepted which does not conform to the specifications therefor. Held, that after the reception of bids, the board of education could not modify the specification by changes, and award a contract to a former bidder, though the lowest, to execute the work according to the revised specifications, at a price less than the original bid.[60]

2. When the board considers there have been too few bids to ensure competition. In such case, the original bidders have a right to appeal to the Commissioner of Education against the action of the board in rejecting the first bids on such grounds, and do not prejudice such rights by submitting bids on the second advertisement:

   > Appellant could have protested the action of the board in reference to the rejection of bids and also have submitted estimates in response to the second advertisement without impairing its claim in

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[58] Buckley v. Jersey City, 107 N. J. Eq. 137, 151 A. 905, affirming decree (Ch.) 105 N. J. Eq. 470, 148 A. 630.

[59] Clatts v. Board of Education of Seaside Park. See footnote 12 *supra.*

[60] Scola v. Board of Education of Town of Montclair, 77 N. J. L. 73, 71 A. 299. See also Kay v. Board of Education of Kearny. See footnote 15 *supra.*

> this appeal. * * * If appellant refrained from submitting a second proposal, it did so at its own peril.[61]

3. Any bid may be rejected if the board, after proper consideration and evidence, finds that the quality of materials to be used by such bidder is not up to the standard required:

> Where the city council could under the specifications reject any bid, they had an absolute discretion to do so, if the quality of the materials proposed to be used by a bidder was not, in their opinion, under his admissions, or under the proofs, up to the standard required, though his bid was the lowest presented.[62]

After a contract has been formally entered into by the local board for the erection of the whole or a part of a school building or for furnishing it, a copy must be filed with the State Board of Education within ten days after it has been signed by the parties entering into it.[63]

F. Appealing from the Award of the Contract

The lowest bidder who desires to protest the award of the contract to another, or any taxpayer, has the right to appeal to the courts or to the Commissioner of Education:

> A person who, as the lowest bidder, is entitled to have a municipal contract awarded to him may, by *certiorari,* question the validity of its award to another.[64]
>
> The right to contest the validity of a municipality's proceedings for a public improvement is a property right accorded to a taxpayer affected thereby, but not to one who is not a taxpayer.[65]

The appeal would be taken to the Commissioner only if there was an alleged violation of the School Law.[66]

In such an appeal, the grounds upon which an unsuccessful bidder might bring action are narrower than those of a taxpayer:

> On *certiorari* to question the validity of the award of a contract to another bidder, the prosecutor cannot question the legality of the advertisement for bids, or of the specifications upon which the contract rests,

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[61] Crouse Coal Co. v. Raritan Township Board of Education (In *MSS.*), decision of Com. of Ed., June 23, 1931.

[62] Ryan v. Paterson, 66 N. J. L. (37 Vr.) 533, 49 A. 587.

[63] Code, Sec. 200.

[64] McGovern v. Trenton, 60 N. J. L. (31 Vr.) 402, 38 A. 636.

[65] Johnson v. Monmouth Beach, 86 N. J. L. 640, 92 A. 347.

[66] Code, Sec. 18.

unless he has some personal or property interest which is injuriously affected by the alleged illegality.[67]

When a board has awarded a contract, the courts will not interfere except in case of fraud, abuse of discretion, or illegal steps in the proceedings:

> The courts will not interfere with contracts of municipal boards acting within the power and discretion vested in them by the legislature unless fraud is shown or discretion is manifestly abused to the injury or oppression of the citizen.[68]
>
> In the absence of fraud or palpable abuse of discretion on the part of the municipal authorities in the exercise of the power granted by the legislature [in awarding contracts], the only question for judicial cognizance is whether there has been any violation of legal principles or neglect of prescribed formalities in entering into the engagement which is the subject of the controversy.[69]
>
> The determination of the body authorized to accept bids for the construction of a schoolhouse upon proper proceedings that a bidder is not responsible is final, and will not be disturbed by a reviewing court, unless it appear that the action was in bad faith, or that the proofs were such as to satisfy reasonable men of the bidder's responsibility.[70]

G. Legality of the Award or of the Contract

There are several conditions which may give rise to an illegal contract.

1. The contract may be *ultra vires,* or beyond the legal powers of the board to make:

   > A municipal board cannot bind the corporation which it represents by any contract which is beyond the scope of its powers; and the municipality may successfully defend an action brought against it for failure to perform such a contract upon the ground that it is *ultra vires.*[71]

   An example of a contract *ultra vires* is the following:

   > A contract with an architect for fees for drawing plans for and superintending erection of a schoolhouse is *ultra vires,* the plans not

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[67] McGovern v. Trenton. See footnote 64 *supra.*

[68] Kraft v. Board of Education, footnote 13 *supra;* Coward v. Bayonne, footnote 36 *supra.*

[69] Ryan v. Paterson. See footnote 62 *supra.*

[70] Schwitzer v. Board of Education of City of Newark. See footnote 14 *supra.* Wilson v. Trenton, 60 N. J. L. (31 Vr.) 394, 38 A. 635, affirmed in 61 N. J. L. (32 Vr.) 599, 40 A. 575.

[71] Fletcher v. Board of Education, 85 N. J. L. (56 Vr.) 1.

having been submitted to and approved by the State Board of Education.[71]

It is the responsibility of anyone contracting with a board to make sure that the board has the power to enter into the contract:

> It is a general and fundamental principle of law, that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, or its officers, to make the contract. And a contract beyond the scope of the corporate powers is void.[72]

2. A contract may be illegal because it is for a sum in excess of the appropriation for the purpose concerned:

> A contract by a municipality to incur an obligation or indebtedness in excess of existing appropriations for the purpose for which the contract is made is illegal.[73]

3. It may be illegal if the contractor is found to have failed to meet specification requirements:

> The award of a contract to a bidder who fails to give a description of the properties of the asphalt to be used, as required by the conditions upon which the bidders are to present proposals, held illegal.[74]

4. It will be invalid if different specifications have been given different bidders:

> The city letting contract * * * vitiated the award when it gave different specifications to different bidders.[75]

5. If a member of the board have an interest, either direct or indirect, in the contract, it may be set aside:

> Where a contract is made by a board of education for sale of its land in which one of the members of the board has, indirectly, an interest, such contract will not be enforced in equity, even though the motives and purposes of the member be honest.[76]
>
> A member of a municipal body, who enters into a corrupt con-

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[72] Schumm v. Seymour, 24 N. J. Eq. 143.

[73] Hurley v. Inhabitants, 67 N. J. L. (38 Vr.) 350, 51 A. 1109, affirming 66 N. J. L. (37 Vr.) 558, 47 A. 518.

[74] Case v. Inhabitants of Trenton, 76 N. J. L. 696, 74 A. 672, reversing Judgment (N. J. Sup.), 68 A. 57.

[75] MacKinnon v. Newark (Sup.), 100 A. 694.

[76] Ames v. Montclair, 97 N. J. Eq. 60.

> tract, forbidden by Crimes Act, § 32, is guilty of a misdemeanor, and the contract is void.[77]
>
> A determination by the city council in a specific case, based on a finding of that body in a matter in which discretionary judgment was reposed in it, is so far judicial as to be voidable, if any of the *quasi* judges who participated was disqualified by private interests, and the award of the public printing to a publishing company in which the councilmen or their wives owned stock renders such award void.[78]
>
> A contract awarded to a private corporation by commissioners of a municipal corporation, one of which was a stockholder in the private corporation, will be set aside on application of a taxpayer.[79]

The Commissioner of Education has ruled that a transportation contract awarded to one who at the time of that action by the board was a member of the board, was illegally awarded, and was void, since the board member had a direct interest.[80] In another transportation case, the Commissioner held that a contract awarded to the husband or wife of a board member is illegal, even though the board member so related took no part in the proceedings, since such board member is financially interested through the husband or wife and therefore indirectly interested within the prohibition of the statute.[81]

This principle of interest in the contract does not extend however to action of the contractor subsequent to the awarding of the contract in purchasing materials without corrupt intent from a board member where such member is a well recognized dealer:

> In the absence of corrupt understanding or agreement of the contractor with the member of the council voting for the contract, to evade Crimes Act, § 32, resolution of the municipality, otherwise legal, is not rendered illegal by subsequent action of the contractor in purchasing material from a recognized source of supply, the proprietor of which happens to be a member of the governing body

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[77] Fredericks v. Wanaque (Err. and App.), 112 A. 309.

[78] Drake v. Elizabeth, 69 N. J. L. (40 Vr.) 190, 54 A. 248.

[79] Brown v. Street Lighting District, 71 N. J. L. (42 Vr.) 79, 58 A. 115.

[80] Rooney v. Millstone Township Board of Education, State School Report, 1929, p. 103, decision of Com. of Ed., June 24, 1929.

[81] Engel v. Passaic Township Board of Education and Swenson, S. L. D., p. 266, decision of Com. of Ed., Jan. 10, 1924.

which awarded the contract; the contract itself not becoming nugatory thereby.[82]

A board may make minor changes in the plans and specifications after the contract has been awarded, under certain conditions, without invalidating the contract:

Minor changes in the plans and specifications made by a board of education in charge of the award of a contract for a school building after approval of the plans and specifications by the state board of education will not invalidate the award of the contract for construction thereof, where it appears that such changes did not relate to the heating and lighting, ventilating, or other hygienic conditions of the building regulated by School Law (P. L. 1903, Sp. Sess., p. 49), § 129, providing that, in order that due care may be exercised in the heating, lighting, ventilating, and other hygienic conditions of public school buildings, plans and specifications shall be submitted to the state board of education before adopted.[83]

Failure to read certain alternative estimates at the meeting of the board at which bids are opened, will not necessarily vitiate the award of the contract:

Under the Crimes Act, § 33 (P. L. 1898, p. 804), providing that, when bids for public buildings are asked for by boards of managers having charge of public institutions such boards or committees representing them shall * * * unseal and publicly announce the contents of the bids in the presence of bidders choosing to attend and make proper record of the prices and terms in the minutes, an award of a contract will not be vitiated by the mere failure of the committee receiving the bids to publicly read certain alternative estimates, where it appears that such course was pursued with the consent of the bidders, and where the bids themselves were publicly read, and no fraud is claimed or indicated.[83]

The State Board rules require that a copy of each contract for transporting pupils be filed with the County Superintendent of Schools. Failure to do so, however, in the Commissioner's opinion does not invalidate the contract:

It is the opinion of the Commissioner that such requirement in the State Board rules as to the filing of the contract etc., upon a definite date is not vital to the validity of the contract, but is intended merely for the County Superintendent's information for appor-

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[82] Fredericks v. Wanaque. See footnote 77 *supra.*

[83] Schwitzer v. Board of Education of City of Newark. See footnote 14 *supra.*

> tionment purposes. Even an entire failure to file the contract while probably resulting in a loss of apportionment would not in the Commissioner's opinion invalidate the transportation agreement itself.[84]

By a recent act of the legislature, transportation contracts may be entered into by boards of education for a term not exceeding three years, when such contracts are approved by the county superintendent of schools.[85]

VI. PERFORMANCE OF THE CONTRACT AND PAYMENT THEREFOR

A. Bonding the Contractor and Protecting Materialmen and Laborers

In order to ensure the completion of the building contract and to protect the school district from claims of materialmen and laborers, the board of education is enjoined by law to require of the contractor a bond in an amount equal to at least one hundred per cent of the contract price. This bond is to be held by the board of education.

If any person or firm has any claim for money due on account of labor performed or material furnished upon the building construction, such persons are to furnish the sureties on the bond, within eighty days after acceptance of the work by the board with a statement of the amount due. The sureties have sixty days in which to settle such claims, after which the claimants may bring suit to recover.[86]

If the contractor fails to furnish the bond within a reasonable period of time, the board of education is free to reaward the contract:

> Where a municipal contract was awarded on condition that, if a bond was not furnished before a certain time, it would be reawarded, * * * the contractor cannot dispute the reaward on his failure to furnish bond, irrespective of his reasons for not giving the bond.[87]

As between the contractor and the materialmen and laborers, however, the responsibility of the contractor under his bond is dependent upon all the terms of the agreements:

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[84] Hardy v. Washington Township Board of Education, Morris Co. (In *MSS.*), decision of Com. of Ed., June 29, 1923.

[85] P. L. 1930, Chap. 13.

[86] Code, Secs. 645–646.

> Where a contractor to build a schoolhouse subcontracted a part of the work agreeing to pay a materialman of the subcontractor when the latter's work was completed, and the subcontractor failed to complete the work, the contractor was not liable.[88]

In one instance at least a contractor set up as a defense in an action on his bond a claim that the board of education had entered into a contract beyond their powers:

> Where the board of education had fully performed its part of a building contract, the contractor could not object, in an action on his bond, that the contract was beyond the powers of the board.[89]

B. Performance of the Contract

In school building operations it is customary to provide in the contract that the work shall be considered completed only when the architect or engineer makes a certificate to that effect. When such is a condition for final payment, the certificate must be produced by the contractor if demanded:

> An action will not lie to recover moneys due on a building contract providing for an architect's certificate as a condition precedent, unless the certificate is produced or its production excused by the evidence.[90]

If the contractor has completed his work, however, the certificate cannot be refused:

> Under a building contract providing for a final certificate by the engineer as a condition precedent to the right of payment, a certificate cannot properly be refused where the contractor has fully performed.[91]

When the certificate is properly issued the owner or school board is liable for payment in full:

> Where a building contract makes the architect's certificate a condition precedent to payment by the owner, the honest issuing of such certificate renders the owner liable for the contract payments.[92]

Acceptance by the owner of the work as completed is under some circumstances a matter of intent rather than of occupancy

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[87] Barrett v. Ocean City, 62 N. J. L. (33 Vr.) 588, 41 A. 946.

[88] Meurer v. Kilgus, 86 N. J. L. 243, 90 A. 1011.

[89] Board of Education of City of Millville v. Empire State Surety Co. of New York, 83 N. J. L. 293, 85 A. 223.

[90] Federal Trust Co. v. Gingues, 76 N. J. Eq. 495, 74 A. 652.

[91] Central Union Stock Yards Co. v. Uvalde Asphalt Paving Co. (N. J. Ch.), 87 A. 235.

[92] Waldron & Co. v. Gilmore, 87 N. J. L. 723, 95 A. 129.

or use, and mere occupancy does not necessarily entitle the contractor to final payment:

In determining whether the owner has accepted a building which has not been erected in substantial compliance with the contract, it is not sufficient to find that the owner occupied it, as the jury must find some positive act of his showing an intention to accept it.[93]

The responsibility of the contractor for the performance of his contract is not affected by his belief that the construction called for is insecure:

The fact that a school building called for by the plans and specifications is wholly unsubstantial will not relieve the contractor from complying with his agreement.[94]

Under a contract guaranteeing the work against defect for a certain time, the contractor is liable:

If, under a contract to do certain work in a specified manner for a specified price and to guarantee the work against certain defects for a specified time, the contractor does the work improperly, the other party may, in a suit for the price, recoup the damages for improper performance, without regard to the guaranty.[95]

If the work has not been completed in accordance with the contract terms, an injunction will issue to prevent payment therefor:

An injunction will issue to prevent a municipal corporation or its officials from paying for work done under a contract, where such work is clearly not in compliance with the terms of the contract.[96]

A substantial compliance with such terms is necessary if the contractor desires to recover:

A contractor who substantially complies with the contract, though he has failed in some minor particulars, is entitled to recover the contract price, less what will be a fair allowance to the owner to make good the defects in the performance of the contract.[97]

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[93] Feeney v. Bardsley, 66 N. J. L. (37 Vr.) 239, 49 A. 443. See also Bradley-Currier Co. v. Bernz, 55 N. J. Eq. (10 Dick. Ch.) 10, 35 A. 832.

[94] Board of Education of City of Millville v. Empire State Surety Co. See footnote [89] *supra.*

[95] Roofing Co. v. Palmer Leather Co., 67 N. J. L. (38 Vr.) 566, 52 A. 389.

[96] Bond v. Newark, 19 N. J. Eq. (4 C. E. Gr.) 376; Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Gr.) 143; Lodor v. McGovern, 48 N. J. Eq. (3 Dick. Ch.) 275, 22 A. 199.

[97] Feeney v. Bardsley. See footnote [93] *supra.*

Even if provision is made for payment of the work on the contract by installments, the contract itself is entire, and the contractor will abandon it at any intermediate stage at his peril:

> Where a contract is made to build and complete a building and find materials for a certain price, payable in installments as the work progresses, the contract is entire; and if the building be blown down by a gale of wind, or fall through a latent defect in the ground, the owner may recover the installments he has paid. Nor is the builder thereby [by collapse of the building] excused from performing his contract.[98]

A "time penalty" clause in a contract, when properly drawn, can be enforced:

> A building contract provided that the entire building should be completed by the 15th day of September, 1908, providing, however, that the owner remove the present building from the proposed site before the 15th of May, 1908. The contract further provided that the contractor should pay to the owner the sum of $25 per day as liquidated damages for each and every day's delay that the work shall remain unfinished after the date agreed upon for the completion of the same. The contract provided that in case of delay in completing the work caused by any act or default of the owner, or other contractor, the time for completion should be extended for a period equivalent to the time lost, such period to be fixed by the architect upon written demand of the contractor. There was no extension of time by the architect. The owner removed the old building entirely from the proposed site on May 17th. The building was not completed until November 14th. Held, that the contractor was liable for liquidated damages from September 17th to the date of the building's completion.[99]

C. Payment of the Contract

The law has established a definite procedure in paying all claims against a board of education. This procedure is fully described in the chapter on "The Legal Basis of Financing Public Education in New Jersey."[100]

VII. LIABILITY OF THE BOARD OF EDUCATION, SCHOOL DISTRICT, OR BOARD MEMBERS UNDER A CONTRACT

A municipal corporation or a school district may be liable for a contract even if illegally formed:

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[98] School Trustees v. Bennett, 27 N. J. L. (3 Dutch.) 513.

[99] Van Buskirk et al. v. Board of Education of Township of Passaic, 78 N. J. L. 650.

[100] See Chapter VIII, pp. 254–259.

A contract incurred by the board of street and water commissioners in excess of the appropriations and limit of expenditure provided by law at the time it was incurred for the purpose of sewer construction, and a contract in violation of § 31 of the crime's act of 1898 is nevertheless binding on the city.[101]

A school district may become liable for a contract in any one or more of the ways suggested in the following decisions:

Contract to obligate corporation must have been its act either by corporate action, that of authorized agent, or by adoption and ratification. Ratification will be implied from acquiescence or the acceptance of the benefits of such contract. It is essential to implied ratification that it and the acceptance of benefits be with knowledge of the facts.[102]

A municipal corporation, having a board or other body empowered to purchase goods for the use of the corporation, may be made liable for such goods, either by the precedent act of such board or body, ordering and directing their purchase, or if the goods have been requisitioned by some subordinate officer, and accepted and used by the corporation, by a subsequent act of such board or body recognizing the purchase, and ratifying it by a valid act directing payment therefor.[103]

If an agent or officer of the school district acting within his apparent powers makes the contract, the school district is bound.[104] An instance of this would be a district clerk purchasing supplies, under rules of the board conferring upon him authority to do so.[105] The board would not necessarily be bound, however, if the agent or officer were unauthorized to act:

A municipal corporation is not bound by a contract made in its name by one of its officers, though within the scope of its corporate powers, if the officer had no authority to enter into such contract on behalf of the corporation.[106]

The city of Newark is not liable for materials furnished and labor performed or orders issued by the chairman of the public building committee of the common council of the city, not authorized by city nor by the committee, where common council had not ratified the chairman's action or paid any like orders.[107]

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[101] Byrne v. Jersey City, 25 N. J. L. J. 132.

[102] Feist & Feist, Inc. v. A. & A. Realty Co., 145 A. 478.

[103] New Jersey Car-Spring, etc., Co. v. Jersey City, 64 N. J. L. (35 Vr.) 544, 46 A. 649.

[104] C. Berenda Weinberg Clinic and Research Laboratories v. Weinberg, 105 N. J. Eq. 690, 149 A. 362.

[105] Code, Sec. 134, and P. L. 1930, Chap. 48.

[106] Giardini v. Dover, 101 N. J. L. 444.

[107] McLean v. Newark (Sup.), 110 A. 692.

However, the board may ratify a contract made by an unauthorized agent, if the contract is not *ultra vires*:

> Where a municipal corporation has a right and power to enter into a given contract, it can legalize it after it has been performed under an authority of its unauthorized agents and convert the money so earned into a legal debt.[108]
>
> A municipal corporation *may* be liable for work done and material furnished it on the order of an unauthorized agent, when the contract for such supplies is one that is within the scope of its corporate powers.
>
> An agency to purchase supplies in the performance of a contract within the scope of municipal powers may by implication, be created by the conduct or acts of the parties.[109]

So far as the liability of individual board members is concerned, the following decision states an important general principle:

> The duty of every public officer, charged with having public work done to be paid for by public money, is to take care that the work is performed on terms most advantageous to the public. He will not be liable for mere errors of judgment, but a willful and corrupt awarding of a contract for such work on terms less advantageous than others offered to do it for, would be a neglect and breach of duty such as to constitute official misbehavior, indictable at common law.[110]

Board members acting within their powers are not individually liable unless they express an intention to be bound:

> Contracts, whether sealed or not, made with public officers acting within the limits of their official authority, are not binding upon them as private individuals, unless an intention to become so bound is plainly indicated by the terms and circumstances of the transaction.[111]

Members of a board signing a contract in incorrect form as individuals, and naming themselves as members of the board are not personally liable:

> Members of a township committee contracting on behalf of the public, and in a sealed bill describing themselves as members of such committee and binding themselves and their successors in office, are not personally liable upon such a contract.[112]

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[108] Mercer County v. Tabish, 97 N. J. L. 439.

[109] Frank v. Board, 90 N. J. L. 273, 100 A. 211.

[110] State v. Kern, 51 N. J. L. (22 Vr.) 259.

[111] Inhabitants of Township of Woodbridge v. Hall et al., 47 N. J. L. (18 Vr.) 388.

[112] Knight v. Clark, 48 N. J. L. (19 Vr.) 22.

VII. SUMMARY

A public body such as a school board is in general subject to the same laws concerning contractual relations as is a private individual. At the same time it is controlled by other provisions specifically set up in the law which control its acts even more particularly than is true of private contracts. At every step, from the first intent to enter into a contractual relationship, until the contract is fully discharged, the school board finds itself subject to laws and to judicial decisions which control every action. The need for protection on the one hand of public funds and interests and on the other hand of those persons dealing with school boards renders this essential. There is therefore set up a series of prohibitions and specific directions, backed up by adequate penalties at law, which if followed ensure fair and honest handling of public contracts.

CHAPTER VIII

THE LEGAL BASIS OF FINANCING PUBLIC EDUCATION

I. Introduction

It is not difficult to locate the responsibility for financing free public schools in New Jersey, at least on the elementary and secondary level. The Constitution gives this responsibility very clearly to the legislature when it requires that body to

> * * * provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years.[1]

The important decision in the case of Rutgers College v. Morgan made it clear that this constitutional mandate did not limit the power of the legislature to provide for educational opportunities for others than those mentioned within these age limits, or by other means than through the State School Fund:

> This provision of the constitution is not a limitation of legislative power over the subject of free public education. It prescribes what must be done with the school fund, not what may be done at the public expense out of the general funds of the state. The facilities for free public education are to be provided by the legislature within the exercise of a sound discretion subject only to constitutional restraints, which must be found in expression or clear implication.[2]

In carrying out the mandate of the constitution concerning provision for maintenance and support of free public schools, the legislature has provided for a division of responsibility between the state and the local unit. The state revenue for education is derived from a number of sources:

1. The State School Fund, the legal name for which is "The Fund for the Support of Public Schools."
2. The State School Tax.
3. The Railroad Tax.

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[1] Constitution, Article IV, Section 7, par. 6, revision of 1875.

[2] Rutgers College v. Morgan, Comptroller, 70 N. J. L. (41 Vr.) 460.

4. The Surplus Revenue Fund.
5. Direct state appropriation by the legislature.

The funds to be raised locally for the support of public schools are to be secured by two possible methods:

1. Local school tax.
2. School bonds.

In addition to state and local sources, a small amount of revenue is derived from Federal sources, under state adoption of the provisions necessary for securing various types of Federal aid.

II. Forms of State Revenue for Education

A. The State School Fund

This fund was established in 1817 and is made up chiefly of the income from leases and sales of "all lands belonging to this state now or formerly lying under water."[3] These lands are administered by the Board of Commerce and Navigation, whose expenses are first paid out of leases, sales, or income from the lands, and the balance remaining each year is paid over to the trustees of the School Fund, whose official title is "The Trustees for the Support of Public Schools." By Chapter 161, P. L. 1930, an additional source of income for the School Fund was found in the increase in Railroad tax, due to general increase in taxation for public road building and for institutional construction, all of which special increase in the railroad tax is to be credited to the School Fund. The money thus received is required to be invested in United States, New Jersey State or Municipal Bonds, or in mortgages of approved type, or in lands or property, and the income from such investments is apportioned to the public schools. If at least $200,000 annually is not realized from the Fund, the balance is to be made up from the State Treasury, and replaced when the income of the Fund makes this possible. Since the income from this Fund has since 1896 been over $200,000 per year, and was fixed by the 1930 legislature at $600,000, it has for many years been unnecessary to exercise this provision of the law.[4] The Board of Trustees of the State

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[3] Code, Sec. 257.

[4] Unpublished Report of experts to New Jersey Commission to Survey Public Education, 1928. Chapter on "Finances," by Harlan Updegraff and Carmon Ross.

School Fund is an ex-officio body consisting of the Governor, the Attorney-General, the Secretary of State, the State Comptroller, the State Treasurer, and the Commissioner of Education. The Secretary of State is secretary of the Board and the State Treasurer is its treasurer.[5]

In order that the State School Fund might not be dissipated or be subject to other demands than educational, the State Constitution as adopted in 1844 provided that all moneys or property coming into the Fund, are to be securely invested and remain a perpetual fund, and that the income, except such part as might be made a part of its capital, is to be appropriated annually

> * * * to the support of public free schools, for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund, or any part thereof, for any other purpose, under any pretense whatever * * *.[6]

This constitutional provision protecting the State School Fund has been upheld very strictly at all times by the Supreme Court. In the case of Henderson v. Atlantic City (1903), it appeared that the legislature had attempted to give the State Board of Riparian Commissioners power to grant certain riparian lands to a number of cities for a nominal consideration. This law was declared to be unconstitutional:

> Under const., art. 4, § 7, par. 6, and P. L. 1894, p. 123, providing that the fund for free schools shall be securely invested and remain a perpetual fund, and that lands under water belonging to the state are irrevocably appropriated for the support of the free schools, P. L. 1901, p. 374, conferring power on the board of riparian commissioners to grant such lands to certain cities for a nominal consideration, is unconstitutional.[7]

A second limitation on the use of the Fund concerns the type of free public school for whose benefit it may be used:

> Const., art. 4, § 7, par. 6, prohibits the appropriation of any part of the school fund to any free public school to which all children of the state between the ages of 5 and 18 are not admitted, and such fund cannot be applied to any other purpose whatever, by which it could be diminished to such an extent that free public schools would be without sufficient support.[8]

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[5] Code, Secs. 255–266.

[6] Constitution, Article IV, Sec. 7, par. 6.

[7] Henderson v. Atlantic City, 64 N. J. Eq. (19 Dick. Ch.) 583, 54 A. 533.

[8] Rutgers College v. Morgan. See footnote 2 *supra.*

the trustees are constituted the representatives of the state.[9]

This decision probably excludes such institutions as the State Normal Schools and Teachers' Colleges, the State University of New Jersey, and the various special state schools, from participation in the benefits of the Fund.

The trustees of the Fund occupy a unique position legally among the various boards having to do with educational matters, in that as trustees they are in most respects free from legislative control:

> The trustees for the support of public schools are the custodians of the fund set apart for the support of public schools, free by constitutional provision from even the control of the legislature, except in the designation of the mode in which the interest and dividends arising therefrom shall be applied for the support of public schools. For the purposes of the administration of the fund of which they are made custodians and of the rights and remedies upon or against the securities in which it is invested, the trustees are constituted the representatives of the state.[9]

In another sense, the power of the trustees is restricted, but merely in the sense that it applies only to the management of the Fund, as the same decision shows:

> The trustees for the support of public schools have no control over the state's lands under water; no authority to decide what lands under water shall or shall not be sold; nor to fix the price or dictate the terms and conditions on which sales shall be made; nor power to rescind contracts of sale, made by the riparian commissioners, which they may deem prejudicial to the school fund. They have not even the capacity to determine from what sources the revenues for the support of public schools shall be derived; no choice as to what money shall or shall not become part of the school fund. Their powers and duties in relation to the school fund are purely executive and ministerial—to invest the fund and appropriate its income annually to the support of public schools.[9]

Under the law, the trustees may invest moneys of the Fund in real estate or other property, but no local taxes assessed against such property can be paid out of the income of the Fund:

> The construction given to the Tax Act of 1918 by the Supreme Court brings it into conflict with the constitutional provisions protecting the school fund and the income thereof from expenditure by the legislature; such expenditure includes expenditure for taxes.[10]

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[9] American Dock and Improvement Co. v. Trustees of Public Schools, 8 Stew. 181.

[10] State v. Rutherford, 98 N. J. L. 465.

The trustees may also lend to the purchaser of any real estate held by them, not over one-half the purchase price of the property, this to be secured by bond and mortgage on the premises purchased.[11] When it does so, however, the amount of the bond and mortgage

> * * * cannot be deducted from the valuation of real and personal estate for which an individual shall be assessed for taxes.[12]

B. The State School Tax

The State School Tax was established by the legislature of 1871, the same legislature which made the schools entirely free.[13] At that time a two-mill tax was levied. Since 1901, the tax has ostensibly been at the rate of 2¾ mills, but in order to reduce the actual tax, the state from 1901 to 1921 appropriated from general funds a part of what would have been the income from such a tax. From 1907-08, the general treasury contributed $100,000 annually until 1921, when this source ceased to be utilized, although it still remains upon the statute books.[14] At the present time the full tax of 2¾ mills, as established by law,[15] is levied and collected. This tax is apportioned among the counties by the State Comptroller to be raised in proportion to the total ratables or assessment of property in the various counties. In each county, the County Board of Taxation apportions this tax in the same manner as other taxes are apportioned, and the tax is assessed, levied, and collected as the local taxes are. The local collector must pay over all this tax money to the county collector on or before December 22 annually, and the county collector must turn over all the state school tax for his county to the State Treasurer on or before January 20 following. This remains in the State Treasury only a few days, and 90% is then returned to the county collector, 10% being retained by the state for the State School Reserve Fund.[16] To all intents and purposes, therefore, the state school tax of 2¾ mills, except for the 10% retained, is, as stated in the New Jersey School Survey Report,[14] a purely local tax, since the 90% goes back to the counties and thence to the districts in proportion to their ratables, exactly the same basis as that on which it was assessed and collected.

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[11] Code, Sec. 264.

[12] Montgomery v. Trenton, 40 N. J. L. (11 Vr.) 89.

[13] *History of Educational Legislation,* 1817-1880. State School Report, 1880, pp. 38–58.

[14] New Jersey State School Survey Report. See footnote [4] *supra.*

[15] Code, Sec. 268.

[16] Code, Secs. 268–270.

The State School Reserve Fund, comprising 10% of the State School Tax annually, is designed for special types of aid to school districts on a common basis, except that one-tenth of the Reserve Fund, or 1% of the State School Tax, is to be used for special equalization aid among needy districts. This fund is known as the ''Emergency Fund,'' and is distributed by the Commissioner of Education.[17]

C. State Railroad Tax

This tax was provided for in 1884, at the rate of five mills on all main-stem railroads and canal property. By the revision of 1906, however, the railroads were assessed at a rate to be determined by the State Board of Taxes, and the tax rate to be the average rate of taxation on the municipalities throughout the state. This act also provided that any amount received above a five-mill tax should be set aside for the schools. In recent years a small portion of this tax was deducted for road building funds and for institutional construction. In 1930, the deductions for road building funds were repealed,[18] and instead were directed to be added to the State School Fund.[19] The major portion of the Railroad Tax is devoted to state educational functions, and a smaller portion is apportioned for local school purposes, as is evidenced by its apportionment as given in the 1929 State School Report.

D. The Surplus Revenue Fund

When in 1837 the United States government divided the surplus revenues among the states, New Jersey distributed its share to the counties in proportion to the state tax which each paid. The counties for the most part invested these funds and devoted their income to support of schools. In 1923, in order to ensure the conservation of these funds, the legislature directed that the counties might return them to the State Treasurer as rapidly as possible and that these should be placed to the credit of the counties and the interest or income thereon should be paid to the county treasurers.[20] While these funds are in reality county school funds, they are managed and their interest apportioned in the same manner as other state school funds, and are therefore included in the discussion as state funds.

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[17] Code, Sec. 270.
[18] P. L. 1930, Chap. 30.
[19] P. L. 1930, Chap. 161.

E. Direct Appropriations by the State Legislature

In addition to the established sources heretofore mentioned, the state provides certain moneys for its educational activities by means of direct appropriations by the legislature out of general state funds. By far the greater part of these appropriations are for purposes of capital outlay in Normal Schools, the State University at Rutgers University, and other institutions controlled by the state. In only one case does such an appropriation apply for current expense items, and this is for the apportionment for school libraries.[21]

III. THE APPORTIONMENT OF STATE SCHOOL FUNDS

A. The State School Fund

The School Law provides that the income of the School Fund is to be used for three purposes, "and for no other use or purpose whatsoever." These uses are, for the support of public schools, the payment of salaries of County Superintendents of Schools, and the payment of premiums and accrued interest on bonds purchased by the trustees of the fund.[22] The apportionment for the support of public schools is to be made annually by the Commissioner of Education to the various counties on the basis of aggregate days attendance of public school pupils for the year preceding apportionment. The Commissioner furnishes to the

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[20] Code, Sec. 339.

[21] Code, Secs. 321–325. Information checked by letter from Charles D. Anderson, Statistician, Business Division, Department of Public Instruction, Trenton, Jan. 9, 1932.

[22] Code, Sec. 260.

State Comptroller, and to the County Superintendents and County Collectors an abstract of such apportionment, together with a statement of the apportionment from the other state funds, and draws his order upon the State Comptroller in favor of the various County Collectors for the amount apportioned to each county.[23]

B. The State School Tax

It has already been indicated that nine-tenths of the State School Tax is returned directly to the counties from the State Treasury, upon the order of the Commissioner of Education upon the State Comptroller in favor of the county collectors, and in exact proportion to the amount of such state school tax levied and collected in the county.[24]

It was also indicated that 10% of the State School Tax is to form the Reserve Fund, and that one-tenth of the Reserve Fund is to constitute an "Emergency Fund." This is an equalization fund at the disposal of the State Board of Education for the assistance of the most needy school districts.[23] Such districts are reported by county superintendents, and the apportionments to them are to be devoted to purposes named by the State Board, and are to be applied under the direction of the county superintendents. This apportionment is paid directly to the custodians of the school districts concerned. If any portion of the Emergency Fund is not used for such purposes, it is returned to the Reserve Fund to be distributed as a part of that fund. The Reserve Fund is used to pay to school districts the tuition for two types of pupils. The first type is composed of children who are resident in the school district, but who reside on property belonging to the state which is not taxable. The second type includes children who are resident in a school district because of being inmates of charitable institutions, or because receiving board or maintenance in private residences at the expense of a charitable organization or institution. For each such child, when approved by the county superintendent, the State Board is required to apportion $45 per year to defray the cost of tuition. If there should remain any part of the Reserve Fund not needed for the purposes indicated, the law empowers the State Board to apportion such remainder among the counties equitably according to its discretion.[25]

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[23] Code, Sec. 27.
[24] See p. 205.

C. The Railroad Tax

This portion of the state revenue for schools has by the acts of 1909 and 1920 been used largely for the support of educational activities and institutions under the direction of the State Board of Education and the Commissioner, and for special aids to various forms of education approved by law. Before any distribution of this fund is made to the counties for school purposes, deductions are made to defray the expenses or cover the apportionments due the following:[26]

1. The expenses of the State Board of Education;
2. The salaries of the Commissioner of Education and his staff, and the expenses of the Department of Public Instruction;
3. The expenses of the State Board of Examiners;
4. The support and maintenance of the State Normal Schools;
5. The expenses of summer schools for teachers;
6. The expenses of teachers' institutes;
7. The contributions on behalf of school districts to the Teachers' Retirement Fund;
8. The support of teachers' libraries;
9. The expenses of county superintendents;
10. The appropriations for the support of the Agricultural College. This covers the needs of the State University so far as the state provides for them.
11. Apportionments to special state schools — New Jersey School for the Deaf, and Manual Training and Industrial School for Colored Youth at Bordentown.
12. Apportionments for evening schools for foreign-born residents;
13. Apportionments for various forms of vocational and industrial education, and for continuation schools;
14. The expenses of the office of Academic Credentials.

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[25] Code, Sec. 270.

[26] Code, Secs. 508–509.

After such deductions are made, the remainder of the Railroad Tax is apportioned to the counties in proportion to their ratables.[27] The relative amounts apportioned to the special purposes named above and to the counties for general school support may be judged from the fact that for the year ending June 30, 1929, the total amount appropriated by the legislature from the Railroad Tax was $8,099,625, and of this amount $1,667,270 remained for distribution to the counties. The largest single apportionment from the Tax was for the Teachers' Retirement Fund, which was just short of three millions of dollars.[28]

D. The Surplus Revenue Fund

The income from the Surplus Revenue Fund is distributed annually and in proportion to the amounts re-deposited in the State Treasury by the various counties. The payments are made to the county treasurers, and are to be apportioned among the school districts in the same manner as other state funds are distributed.[29]

Tables II and III present an analysis of the plans for distributing the state school moneys to school districts, either directly or through the county superintendents.

Most of the disputes concerning state apportionments for schools seem to have arisen after the money has reached the local custodian of school funds. No instance has been found in which appeals have been made concerning apportionments by the Commissioner or the State Board, and only one case in which an appeal appeared concerning the proper exercise of this function by the County Superintendent. In this case, the County Superintendent refused to apportion the customary three-fourths of the cost of transporting certain school children, and the board of education of the district concerned appealed to the Commissioner, who sustained the County Superintendent. On an appeal to the State Board, the case was remanded to the Commissioner for a rehearing on certain points. The substance of the decision appears in the following statement, and illustrates the point that

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[27] Code, Sec. 506.

[28] State School Report, 1929: *Sources of Income,* p. 317.

[29] Code, Sec. 339.

TABLE II

APPORTIONMENT OF STATE SCHOOL FUNDS BY STATE AGENCIES

Name of State Fund	Ultimate Destination of Moneys Apportioned	Basis of Distribution by State	Date of Apportionment	Apportioned by what State Agency, and in whose favor	State Comptroller draws warrant on State Treasurer in favor of officer as indicated
Income of State School Fund	1. Trustees of Fund for premium and interest on bonds.				
	2. Salaries of county superintendents.				County Superintendents.
	3. School districts.	Average daily attendance of pupils in counties previous year.	Annually	Commissioner of Education, in favor of County Treasurers.	Warrant drawn in favor of County Treasurer on order of Commissioner of Education.
State School Tax (90% Fund).	School districts.	Assessed valuation of ratables of county.	On or before Jan. 15 annually.	Commissioner of Education, in favor of County Treasurers.	Warrant drawn in favor of County Treasurer on order of Commissioner of Education.
Reserve Fund	School districts.	$45 per year for each pupil approved.	On or before Feb. 15 annually.	State Board apportions, Commissioner of Education draws order in favor of local custodian of school moneys.	Warrant drawn in favor of local custodian of school moneys on order of Commissioner of Education.
Emergency Fund	School districts.	Need of district.	On or before Feb. 15 annually.	Commissioner of Education in favor of local custodian of school moneys.	Warrant drawn in favor of local custodian on order of Commissioner of Education.
Railroad Tax	1. State Board office and Department of Public Instruction.	Actual expense as appropriated in budget.	Sept. 1 and Oct. 25 annually.		State Comptroller deducts amount appropriated by legislature from Railroad Tax to remain in State Treasury.

TABLE II—(Continued)

APPORTIONMENT OF STATE SCHOOL FUNDS BY STATE AGENCIES

Name of State Fund	Ultimate Destination of Moneys Apportioned	Basis of Distribution by State	Date of Apportionment	Apportioned by what State Agency, and in whose favor	State Comptroller draws warrant on State Treasurer in favor of officer as indicated
Railroad Tax (Con.)	2. Summer schools for Teachers.	Actual expense as appropriated in budget.	Sept. 1 and Oct. 25 annually.	Commissioner of Education approves bills.	State Comptroller deducts amount appropriated by legislature from Railroad Tax to remain in State Treasury.
	3. Teachers' Institutes.	Actual expense.	“ “	“ “	“ “
	4. Normal Schools (Current Expense).	“ “	“ “	State Board controls finances and approves expenditures.	“ “
	5. Teachers' Pension and Annuity Fund.	Actual needs under law.	“ “	Board of Trustees of Fund makes requisition.	“ “
	6. County Teachers' Libraries.	$100 to establish, not over $50 annually.	“ “	Commissioner of Education in favor of County Superintendent.	“ “
	7. Staff of county superintendent.	As approved by State Board.	“ “	Commissioner of Education in favor of County Treasurer.	“ “
	8. State University (Current Expense).	Appropriation by legislature.	“ “	Appropriated by Legislature.	“ “
	9. New Jersey School for Deaf (Current expense).	“ “	“ “	“ “	“ “
	10. School for Colored Youth (Current Expense).	“ “	“ “	“ “	“ “
	11. Industrial Education (Manual Training).	“ “	“ “	“ “	“ “

TABLE II—(Continued)

APPORTIONMENT OF STATE SCHOOL FUNDS BY STATE AGENCIES

Name of State Fund	Ultimate Destination of Moneys Apportioned	Basis of Distribution by State	Date of Apportionment	Apportioned by what State Agency, and in whose favor	State Comptroller draws warrant on State Treasurer in favor of officer as indicated
Railroad Tax (Con.)	12. Vocational Education	Appropriated by Legislature	Sept. 1 and Oct. 25 annually.	Appropriated by Legislature.	State Comptroller deducts amount appropriated by legislature from Railroad Tax to remain in State Treasury.
	13. Continuation Schools	" "	" "	" "	" "
	14. Evening Schools for foreign born.	" "	" "	" "	" "
	15. Academic Credentials.	" "	" "	" "	" "
	16. School districts receive balance after all deductions are made.	Assessed valuation of ratables of county.	On or before Feb. 1 annually.	Apportioned by State Comptroller in favor of County Treasurers.	Warrants drawn in favor of County Treasurers.
Income of Surplus Revenue Fund.	School Districts.	In proportion to amount of fund to credit of each county.	Annually	State Comptroller in favor of County Treasurer.	Warrant drawn in favor of County Treasurer.
Appropriations out of General State Funds.	1. Capital Outlay in State University, Normal Schools and other State Institutions.	As appropriated by legislature.	As granted	Legislature to State Comptroller.	Treasurer of institution.
	2. School Libraries (School district or county library commission) (Current Expenses).	$20 to establish, $10 for annual maintenance.	Annually	Order of Public Library Commission.	Warrant drawn in favor of custodian of school moneys of district, or County Treasurer, as situation requires.

TABLE III

APPORTIONMENT OF STATE SCHOOL FUNDS BY COUNTY SUPERINTENDENT

(Apportionment annually by County Superintendent upon order to County Treasurer of State funds in hands of County Treasurer, consisting of balance of State School Fund, 90% of State School Tax, Balance of Railroad Tax, and Interest on Surplus Revenue Fund.)

Deductions made by County Superintendent before apportioning funds.	1. Salaries and expenses of helping teachers. 2. Salaries and expenses of County Supervisor of Child Study, if any, from Railroad Tax. 3. Expense allowance of County Medical Inspector, if any, from Railroad Tax. 4. Expense allowance, and, under certain conditions, salary of County Attendance Officer, if any, from Railroad Tax.
Apportionments to custodians of school moneys of districts on or before April 1, annually, on basis of teacher quotas.	1. $600 for each city superintendent or approved supervising principal. 2. $500 for each teacher of special class for blind, deaf, mentally sub-normal, or crippled children. 3. $400 for each assistant superintendent, supervisor, and permanent teacher in approved 4-year high school. If supervisor is employed by two or more districts, the apportionment is divided on basis of number of teachers supervised. 4. $300 for each permanent teacher in approved 3-year high school. 5. $400 for each continuation school teacher of district, or employed by county vocational school, and proportionately less for each teacher employed part-time. 6. $315 for each permanent teacher in intermediate school or senior high school in 6-6 or 6-3-3 system. 7. $250 for each permanent teacher in intermediate school in district not having senior high school. 8. $200 for each permanent teacher in kindergarten or elementary school, or in approved high school course less than 3 years in length. 9. $100 for each teacher employed for foreign-born classes for the term school was maintained. 10. $80 for each temporary teacher employed at least 4 months. 11. $80 for each approved evening school teacher. 12. $200 for each principal and permanent teacher in approved evening 4-year high school. 13. $300 for each full-time registered nurse employed. If nurse is employed by two or more districts, each shall be apportioned 50% of cost, but not over $100.

TABLE III—(Continued)

APPORTIONMENT OF STATE SCHOOL FUNDS BY COUNTY SUPERINTENDENT

Apportionment to custodians of school moneys of districts on or before April 1, annually, on basis of pupil quotas.	1. 75% of cost of approved transportation of pupils. 2. $60 for each pupil attending high school in another district for whom district of residence pays tuition. 3. $15 for each pupil attending elementary school in another district for whom district of residence pays tuition.. 4. $25 for each crippled child attending school in another district for whom district of residence pays tuition.
Apportionment to custodians of school moneys of districts on or before April 1, annually, on basis of total days' attendance of pupils.	1. The remainder of all state school funds, after preceding deductions and apportionments are made, are apportioned on basis of total days' attendance of all pupils enrolled in the public schools, pro-rated among the districts of the county.

apportionment in the case of pupil transportation must be based on the approval of the County Superintendent, in the exercise of a sound discretion:

> When a school is closed in a center of population and the children are transported to a school two miles more or less distant, shall the County Superintendent apportion the county school moneys to such school district, when it chooses to close a school at a point where many children reside? There is no question as to the right of a board of education to close a school and have the children transported to another school; it is thus furnishing, as the law commands, school facilities by taking the children to a distant school rather than having the school placed so as to be convenient of access to the children. When the county funds are apportioned, however, the question arises immediately as to the right of the county to furnish proper school facilities in such cases. * * * If a board of education chooses to locate its schools in such places as to make transportation of pupils necessary, then such board should provide the transportation itself, which would be carrying out the general provisions of law which require the furnishing of proper school facilities either by bringing the school to the children or the children to the school.
>
> With this view of the case, it is the judgment of the Commissioner of Education that the County Superintendent of Schools of Monmouth County acted with sound discretion in concluding that the necessity for transportation was of the Board's creation and was not such necessity as the law

contemplated when it provided for apportionment of school moneys in part payment of transportation.[30]

IV. Local School Revenue in Article VI Districts

An essential difference in powers and administration of school affairs by Article VI boards of education from those of Article VII boards appears in the manner established by law for handling school finances, especially in securing local revenue. It is therefore necessary to distinguish throughout this discussion between the practices in Article VI districts and those in Article VII districts. In each case, the board of education is subject to restrictions in the adoption of a school budget. In the former type of district, the check rein is held by a body called the Board of School Estimate; in the latter, by the voters in annual or special meeting.

In Article VI districts, three bodies have certain functions to perform in the matter of securing revenue locally for school support, namely, the board of education, the board of school estimate, and the governing body of the municipality, usually the common council of a city. The board of school estimate is appointed annually in January, two members of the board of education being selected by that body, two members of the governing body of the city being appointed by that body and the fifth member, the mayor, serving ex-officio.[29] The Secretary of the board of education is to serve as secretary of the Board of School Estimate. Vacancies in the latter board are to be filled immediately by the board which originally appointed the member whose office was made vacant.[31] In the Lambertville case the Supreme Court held that

> * * * where the board of education confirmed the appointment of members of the board of school estimate, the fact that the president of the board named the members in the first instance does not invalidate their appointment.[32]

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[30] Board of Education of Borough of West Long Branch v. County Superintendent of Schools of Monmouth County, S. L. D., p. 252, decision of Com. of Ed., Dec. 22, 1920.

[31] Code, Sec. 94.

[32] Lambertville v. State Board, 90 A. 242, reversed on other grounds in Lambertville v. Board, 93 A. 596.

A. The Preparation and Presentation of the Budget

The preparation of the budget in Article VI districts is the duty of the board of education. The general provision in the first type of estimate, namely, for annual expenses, is that

> * * * on or before the eighth day of February, in each year, the board of education of such city school district shall prepare and deliver to each member of said Board of School Estimate an itemized statement of the amount of money estimated to be necessary for the current expenses of and for repairing and furnishing the public schools of such district for the ensuing school year, and also the amount which shall have been apportioned to such district by the county superintendent.[33]

The School Laws provide for a similar step by the board of education for the second type of estimate, namely capital expenditures, when it seems to the board

> * * * that it is necessary to raise money for the purchase of lands for school purposes, or for erecting, enlarging, repairing or furnishing a schoolhouse or schoolhouses * * * [34]

It will be noticed that both of these provisions, the one concerning current expense and repairing and furnishing schools, and the other for purchase of lands and for erecting, enlarging, repairing, and furnishing schoolhouses, contain provisions for "repairing" and for "furnishing" schools. It therefore becomes a question under which class a board of education should request funds for these two purposes. It seems evident that the court decision in Lambertville v. State Board covers this seeming overlapping:

> There is a distinction in the use of the word "repairs" as used in 74 and 76 of the School Law. In section 74 the term refers to ordinary current repairs, such as would naturally form part of the school's current expenses. Under section 76 it refers to those more important repairs, such as enlarging a schoolhouse.[35]

It is assumed that the interpretation here given for the two uses of the term "repairs" may be extended to cover the term "furnishings" or "furniture."

There have been numerous controversies between city boards of education and boards of school estimate or common councils concerning the extent to which the school board must itemize its estimate. No decision has been located which seems to require that in the first type of estimate, the school board shall specify separately the amount for current expense on the one hand and those for repairs and for furnishings on the other. The decision in Stanton v. Board, although pertaining to an Article VII board, would seem to contain the essential principle:

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[33] Code, Sec. 95.

[34] Code, Sec. 97.

[35] Lambertville v. State Board (Sup.), 90 A. 242.

> The phrase "current expenses" or "running expenses" is sufficiently definite to denote one of the purposes for which a school tax is to be levied.[36]

In the matter of requests for funds for capital outlay, however, a certain degree of specification of amounts requested is sometimes required. In the Lambertville case previously cited, the board of education had requested a lump sum "with which to purchase, or take and condemn the above mentioned tract of land, and for constructing thereon a new school building and furnishing same and for repairs to existing school buildings." The Court of Errors and Appeals held that the resolution in that form did not meet the requirements of law:

> The repairs for which the present appropriation is sought are undoubtedly of the character of current expenses, since they are repairs to existing school buildings and it is not shown that any but ordinary necessary repairs are contemplated. The amount asked therefor should have been separately stated.
>
> Moreover, although section 76 does not in terms require an itemized statement, it requires the Board of Education to deliver to each member of the Board of Estimate a statement of the amount of money estimated to be necessary for the purpose or purposes. The obvious intent was to enable the Board of Estimate to act intelligently in fixing and determining the amount necessary for such purpose or purposes. It would be quite impossible for the Board of Estimate to act intelligently upon a certificate which included in a lump sum the amount necessary for purchase of land and erecting a new schoolhouse, and the amount necessary for repairs to existing schoolhouses. An appropriation made in that way would put it in the power of the Board of Education to expend the whole appropriation for repairs.[37]

This decision would lead us to believe that if by "repairs" the board of education contemplated extensive repairs such as the remodeling of a building, such would be included properly with the request for funds for purchasing land and erecting and furnishing a schoolhouse, in a lump sum, and need not be specified separately. Whether this can be accepted as the true interpretation of that decision, however, is uncertain. The opinion in the Wildwood appeal does not seem to accept this view. In this decision, the Commissioner, in referring to the quotation from the Lambertville case just given, said:

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[36] Stanton v. Board of Education, 59 N. J. L. (30 Vr.) 496.

[37] Lambertville v. Board, 93 A. 596, reversing Lambertville v. State Board, 90 A. 242.

> By the text of the decision, it is plain that two purposes were in the mind of the Court, namely, repairs to old buildings, on the one hand, and the purchase of a lot and the erection of a building thereon, on the other, for the Court stated that the whole sum appropriated might be expended for repairs alone.[38]

This seems to set repairs of all kinds apart from other forms of capital outlay.

The Wildwood case also brought the ruling that since in the Lambertville case it was not required that estimates for purchasing land be stated separately from those for erecting a building, there was no ground on which the Commissioner was justified in making this requirement.

It is evident in any event that requests for funds for the first type of expenditures, related to current expense, must be specified separately from those for funds for the second type of expenditures, allied to capital outlay.

An opinion of the Commissioner of Education covering the necessity for boards of school estimate to fix amounts separately for certain purposes, would seem to require the same degree of itemization in the official estimates of the board of education:

> There would seem to be no question * * * but that a Board of School Estimate, while bound to appropriate in bulk for the ''current expenses of and for repairing and furnishing the public schools,'' is equally bound to make separate and distinct appropriations for such purposes as manual training, evening schools for foreign-born and vocational schools, in order that such specific appropriation may form an adequate basis for state aid.[39]

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[38] Board of Education of the City of Wildwood v. Board of Commissioners of the City of Wildwood, S. L. D., p. 78, decision of Com. of Ed., June 15, 1915.

[39] Opinion of Com. of Ed., *Education Bulletin*, Vol. XIV, No. 5, Jan., 1928, p. 133.

In case a board of education of an Article VI district finds that it has underestimated its annual needs, or if through accident an emergency should arise which would make necessary unforseen repairs to school buildings, the board is privileged to prepare and deliver to the members of the board of school estimate a statement of the amount of money needed to cover such unusual expense.[40]

B. Determining the Amount to Be Appropriated

If the function of the board of education is to prepare the school budget and make an estimate of the needs of the district for capital outlay and to submit them to the board of school estimate, it is the function of the latter body to ''fix and determine the amount of money necessary to be appropriated'' for such purposes.[41] In the case of the annual budget, it is required to do this between ''the first and fifteenth day of February in each year.''[42] Within this fifteen-day period it must fix and determine the amount of money necessary to be appropriated for such purposes, and certify such amount to the common council and to the board of education. By the Rules and Regulations of the State Board, the Mayor is to be the presiding officer of the Board of School Estimate, and in his absence, the members thereof are to elect a presiding officer pro-tem. The Mayor is required to call a meeting of the Board of School Estimate to consider a request of the board of education and to make the necessary appropriation, within ten days after the latter body furnishes a statement of the amount of money required for current expenses, repairs and furnishings, or for the purchase of land or for the erection of a building.[43] Having performed this duty, it cannot reconvene, except upon call from the board of education. The same principle would apply to cases which involved certification of funds for capital outlay. The following states this principle well:

> The powers of the Board of School Estimate are limited to acting upon requests for appropriations by the Board of Education. Having acted

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[40] Code, Sec. 96.

[41] *Ibid.*

[42] *Ibid.*

[43] Rules, Nos. 141–142.

> upon a request of the Board of Education and adjourned, it cannot reconvene until another request is received.[44]

Furthermore, if a meeting of the board of school estimate has been held pursuant to law, and it is desired to continue its work in a special meeting at a later date, the same rule holds as to notification of members as in the case of boards of education:

> A special meeting of the board [of school estimate] is not legal unless all the members have had notice of the time, place and purpose of the meeting, but the law does not state how such notice shall be given.[45]

When the board of education submits its budgetary proposal to the board of school estimate, it must specify separately the amounts for current and allied expenses, and for capital outlay, and in the opinion of the Commissioner previously quoted must evidently specify separately the amounts desired for manual training, vocational education, foreign-born classes, and for other special expenditures for which the state grants aid, but in other respects may itemize as much or as little as it chooses. Similarly, the board of estimate in fixing the amount to be appropriated, must specify these same items separately. However, when the board of school estimate makes its certificate to the common council, it represents a certificate for the lump sum, since the former body cannot legally fix the amount of separate items:

> The certificate of the board of school estimate to the municipal board required by School Act, § 75, is a certificate of the total amount required for the purposes specified in section 74, and not of the specific items to which the amount is applicable.[46]

If this were not true, the board of school estimate would be able not only to determine the amount to be appropriated but also how each item would be spent:

> After consideration of the itemized statement of the Board of Education the board of estimate must appropriate in bulk and * * * any attempt on the part of the latter body through its method of appropriation to control the exact disposition of school funds is a usurpation of the statutory powers of the Board of Education.[47]

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[44] Board of Education of Rahway v. Board of School Estimate, S. L. D., p. 66, decision of Com. of Ed., Dec. 15, 1914.

[45] Board of Education of City of Lambertville v. Common Council of City of Lambertville, S. L. D., p. 51, decision of Com. of Ed., Apr. 8, 1913.

[46] Townsend v. State Board, 88 N. J. L. 97, 95 A. 729.

[47] Board of Education of City of Bayonne v. Ryan, S. L. D., p. 47, decision of Com. of Ed., Dec., 1926.

After the board of school estimate has fixed and determined the amount to be appropriated for current expense and the funds are in the hands of the school board they may be expended by the latter body for such purposes as are within the law:

> A board of Education in a City School District may, in its discretion, use for any item of current expense, moneys appropriated by the Board of School Estimate, without regard to the several amounts estimated as necessary for the several purposes specified in its statement to the Board of School Estimate.[48]

If, however, a board has requested and been granted funds to purchase equipment for a cafeteria, a manual training department, and similar purposes, it cannot use those funds to purchase land for an athletic field, since the board of school estimate had not been notified legally of the purpose for which funds were to be expended if land were to be purchased:

> It is the opinion of the Commissioner that when city boards of education desire to purchase land, the money which may be expended for that purpose must be determined by the board of school estimate, and unless the latter board has determined an amount which may be used for such purpose, the expenditure of funds is illegal.[49]

This certificate of the board of estimate must be absolute in its terms, and not conditioned upon any action of the board of education:

> A resolution of the board of school estimate, fixing and determining the amount of money necessary for the erection of a schoolhouse at the sum of $175,000, on condition that a school building containing twenty units shall be erected, is not such a determination of the amount necessary for the purpose of building as is required by School Law. * * * Even if the condition is void it shows that the action of the board of estimate was not final, and that the amount was only tentatively determined.[50]

However, a discussion or recommendation of the board of estimate in such matters does not invalidate the certificate, but is merely of no effect and not binding upon the school board:

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[48] Hayes v. Townsend, S. L. D., p. 296, decision of Com. of Ed., July 24, 1914, affirmed by St. Bd., and by Supreme Court, Nov. 17, 1915. See also Townsend v. State Board. See footnote [46] *supra.*

[49] The Mayor and Common Council of the City of Pleasantville et al. v. Board of Education of City of Pleasantville et al. (In *MSS.*), decision of Com. of Ed., Feb. 17, 1931, affirmed by St. Bd., May 9, 1931.

[50] Board of Education of Montclair v. Town Council of Montclair, 76 N. J. L. 59, 68 A. 795.

> An appropriation asked for by the board of estimate for the erection of a public school is not illegal because they discussed the availability of certain sites as a basis for an appropriation; their estimate not being inseparably conditioned upon a purchase of any definite site.[51]

Once a board of school estimate has passed a resolution and certified an amount to the municipal board, it cannot of itself rescind the action:

> I am of the opinion that a Board of School Estimate cannot take the initiative in rescinding resolutions that have been adopted by it fixing and determining the amount of money to be raised for school purposes. There is no doubt that recision of action can be taken in the case of moneys ordered to be raised for given school purposes provided the initiative in the recision be taken by the Board of Education and, provided further that the rights of third parties relating thereto, have not become vested.[52]

Nor can the board of estimate change the amount certified after such action has been taken:

> The Board of School Estimate having, prior to June 1st, certified to the Common Council and to the Board of Education the amount of the appropriation, the matter was beyond its control, and the action taken on August 3rd, attempting to reduce the amount of the appropriation, is null and void.[53]

If a board of estimate has once certified an appropration for school building purposes and the building contractor abandons the project uncompleted, the original certificate suffices in making valid a new contract with another builder:

> Where the total cost of a school building has been approved by the board of school estimate, it was not necessary that the board should again sanction the expenditure under a new contract after abandonment of the original.[54]

C. Provision by the Municipal Board of the Funds Appropriated by the Board of School Estimate

It has been shown that it is the function of the board of education to prepare the budget estimates for current expense and capital outlay and to place them before the board of school estimate; the function of the latter body is to fix and determine the amounts which they approve. The governing body of the municipality is required by law to provide funds to meet these appropriations. As respects funds for current expense, it is required that the governing body or other body having power to raise money by taxes in the city

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[51] Lambertville v. State Board. See footnote 32 *supra.*

[52] Board of Education of School District of West New York v. Town Council of Town of West New York, State School Report, 1919, p. 212, decision of Com. of Ed., May 31, 1919.

[53] Board of Education of Rahway v. Board of School Estimate. See footnote 44 *supra.*

[54] Holden v. Board, 85 N. J. L. 370, 91 A. 990.

> * * * appropriate by including the amount so certified as aforesaid in the tax ordinance and said amount shall be assessed, levied and collected in the same manner as money appropriated for other purposes in such city shall be assessed, levied and collected; provided, that any amount in excess of one and one-half per centum of the valuation of the assessable ratables of such city * * * shall be appropriated only with the concurrence and consent of said common council, board of finance or other body expressed by its resolution duly passed.[55]

As respects capital outlay, when the board of school estimate has certified a certain amount for such purposes to the governing body of the municipality and to the board of education, in any city

> * * * said governing body may appropriate such sum or sums for such purpose or purposes in the same manner as moneys appropriated for other purposes in such city are raised, assessed, levied and collected; or said governing body may appropriate and borrow such sum or sums for the purpose or purposes aforesaid, and may secure the repayment of the sum or sums so borrowed, together with interest thereon at a rate not to exceed six per centum per annum, by the issue of bonds in the corporate name of such city, * * * [56]

In all cities, the governing body of the municipality can exercise a large degree of control over such appropriations for capital outlay through bonding, since

> * * * no amount in excess of three per centum of the taxable valuation of the real and personal property shall be appropriated only with the concurrence and consent of the governing body, expressed by its resolution duly passed.[57]

A still further restriction upon the use of funds for capital outlay is found in the same section of the law, which provides that bonds may not be issued for such purposes beyond the limit of six per centum of the taxable valuation of the city except after the consent of the legal voters is secured at a general, special, or municipal election, upon submission by the governing body, and not even with the consent of the voters can bonds be issued beyond nine per cent of the taxable valuation of the city.[57] This nine per cent limit may not be available to the voters, however, and it may even be injudicious for the authorities to seek to exercise it, since the law also provides that the total bonding limit of a city for both school purposes and municipal purposes, is to be 13% of the average assessed real valuations for the past three years.[58] Of this amount, it was evidently intended that a maximum of 6% should be for schools, and 7% for municipal purposes. The Attorney-General's office has held that when the school bonding limit of 6% is exceeded by vote of the people, the 7% borrowing capacity of the municipality is by so much impaired.[59] It is evident that the board of education faces a serious obstacle to securing more than the 3% borrowing margin since beyond that point and up to 6% the governing body must consent; and between 6% and 9% the voters must consent, and moreover the school authorities must face a probable battle with municipal authorities beyond the 6% limit, since anything beyond that point subtracts from the borrowing capacity of the municipal government.

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[55] Code, Sec. 96.

[56] Code, Secs. 97, 107 (1).

[57] Code, Secs. 104, 107 (8).

It is important to note the interpretation of the law in respect to the 3% limit. The statute is not interpreted to mean that not more than 3% can be raised at any time for capital outlay without consent of the governing body, but that not more than a total of 3% can be issued in the form of bonds without their consent. If the board of estimate fixes an amount for capital outlay which would represent more than 3% of the taxable valuations of the city, the governing body cannot block the school board and the board of estimate by refusing to grant the entire appropriation, but in case it refuses to issue bonds to a greater amount than 3%, must raise the balance by taxation:

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[58] P. L. 1924, Chap. 89.

[59] Opinion of H. R. Coulomb, Assistant Attorney-General, Apr. 2, 1924. *Education Bulletin,* Vol. XIV, No. 3, Nov., 1927, p. 82.

The law prohibited the Common Council from issuing bonds for school purposes in excess of a sum equal to three per centum of the taxable property in the district, but the law gives to said council the option of raising the amount fixed and determined by the Board of School Estimate, by the issue of bonds, by direct tax or both.[60]

It has been decided by the Commissioner of Education in a number of cases before him that it is mandatory upon the appropriating power in a city school district to raise the money certified to it by the Board of School Estimate when the bonds for such purposes including bonds theretofore issued for the purposes named in the section above quoted [Section 107, sub-section 1, 1928 Code] and not redeemed are not in excess of the 3% limitation of the taxable valuation fixed by statute. * * * The act merely gives the option to the governing body to determine whether it will raise the entire amount in the budget or whether it will issue bonds where the amount does not exceed 3% of the taxable valuation of the real and personal property.[61]

The governing body furthermore does not possess the right of initiating action in respect to school finance:

It thus appears by court decision (Montclair v. State Superintendent, 47 Vr. 68) the Common Council or governing body of a city school district can take no initiative in the matter of raising money for school purposes, nor can it fix or determine the amount of money that should be raised, nor has it the power of determining the kind of school building, or selecting the lot on which the school building shall be erected. When a Board of School Estimate fixes and determines the amount of money necessary for school purposes the governing body has no choice in the matter but to raise the money ordered in the manner provided by law.[62]

The governing body has nothing to do with the amount of any items which may be specified in the certificate, and cannot object to the amounts as determined for various items:

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[60] Board of Education of City of Lambertville v. Common Council of City of Lambertville. See footnote 45 *supra.*

[61] Board of Education of Somers Point v. Mayor and Common Council of City of Somers Point (In *MSS.*), decision of Com. of Ed., July 19, 1930. See also Town Council of Montclair v. Baxter, 76 N. J. L. 68. Board of Education of Montclair v. Town Council of Montclair, 76 N. J. L. 68. Townsend v. State Board. See footnote 46 *supra.* County of Monmouth v. Long Branch, 2 N. J. Misc. Rep. 150. Board of Education of City of Pleasantville v. Common Council of City of Pleasantville (In *MSS.*), decision of Com. of Ed., July 17, 1922. Board of Education of City of Bayonne v. Board of Commissioners of City of Bayonne, State School Report, 1919, p. 209, decision of Com. of Ed., Mar. 19, 1919. Board of Education of Rahway v. Board of School Estimate of Rahway. See footnote 44 *supra.*

[62] Board of Education of School Estimate of West New York v. Town Council of Town of West New York. See footnote 52 *supra.*

> It is further the opinion of the Commissioner that the Common Council has no legal right to object to the certification of a lump sum by the Board of School Estimate with no specification of the two items involved in such lump sum [for two buildings]. Fixing and determining the amount of money necessary for the purposes requested by the Board of Education rests entirely with the Board of School Estimate, and if a lump sum for two building propositions was determined upon by the Board of School Estimate, it did not lie with the Common Council to object, since * * * the sole function of the latter body is to raise the amount certified to it within the statutory limitations.[63]

The governing body cannot legally embarrass the board of education by postponing action in the matter of raising funds:

> [It cannot] postpone action. Section 75 directs the Common Council ''upon receipt of such notice'' to appropriate the amount certified to it by the Board of School Estimate.[64]

The governing body can neither change the amount certified nor control the expenditure of the money:

> The Common Council has no power to increase or decrease the amount certified, the right to determine the amount necessary to be raised for school purposes being vested solely in the Board of School Estimate; neither is it in any wise responsible for expenditure of school moneys.[65]

Failure of the governing body to raise the funds determined by the board of estimate as necessary, is a controversy under the school laws:

> When the body having power to make appropriations of money raised by tax fails to provide the amount fixed and determined by the board of school estimate, a controversy has arisen under the school laws, and the remedies by appeal to the State Superintendent of Public Instruction and the State Board of Education must be exhausted before recourse is had to the courts.[66]

One cannot fail to note that the Mayor of a New Jersey city occupies a commanding position in respect to city school finance as well as in respect to control of school policies through appointment of members of boards of education. As the fifth member of the board of school estimate he has it in his power to cut down school appropriations, or to use the threat of doing so as a political club upon members of the board of education. That board is therefore in an unenviable position, since the power to determine school policies is useless without the independent power to appropriate funds to carry them through.

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[63] Board of Education of City of Pleasantville v. Common Council of City of Pleasantville. See footnote [61] *supra.*

[64] Board of Education of Rahway v. Board of School Estimate of Rahway. See footnote [44] *supra.*

[65] Board of Education of City of Bridgeton v. Common Council of City of Bridgeton, S. L. D., p. 61, decision of Com. of Ed., Oct. 31, 1913.

[66] Montclair v. State Superintendent, 76 N. J. L. (47 Vr.) 68.

A second embarrassment to which the city board of education is subject arises from the fact that, as the State Survey Report pointed out,[67] the municipal budget is fixed during December of each year, while the board of education presents its budget to the board of school estimate between February 1 and 15. Since the municipal budget antedates the school budget, it is likely to make the amount of school funds voted dependent to some degree upon the size of the municipal budget, due to a possible desire on the part of municipal authorities to keep down the tax rate. The very great dependence of the city school board upon the municipal officers in securing school funds is an outstanding feature of the New Jersey city school situation.

Similar to the set-up for securing school funds in Article VI districts is that found for County Vocational Schools. For these schools the budget is prepared by the County Board for Vocational Education and submitted to the County Board of School Estimate on or before May 15. This board of estimate consists of two vocational board members appointed by that board, two members of the board of chosen freeholders appointed by that body, and the county supervisor or director of the board of chosen freeholders. The board of estimate is required to fix and determine between May 15 and June 1 the amount to be appropriated for the needs of the vocational board for current expenses, and for capital outlay at such time as request for funds for that purpose is presented, and the board of chosen freeholders is required to appropriate funds for such purposes and raise the money by taxation or by bond issue.[68] The same procedure is prescribed for county vocational boards for continuation schools.[69]

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[67] Unpublished Report of Experts to New Jersey Commission to Survey Public Education, 1928. Chapter on ''New Jersey City School Organization,'' by Arthur B. Moehlman.

[68] Code, Secs. 441–443.

[69] Code, Secs. 471–474.

Another type of county school for which a different plan of securing revenue is employed is the County Parental School. Whenever the judges of the Court of Common Pleas and the board of chosen freeholders of any county of the first class agree that such a school is necessary, the judges appoint a board of trustees of five members who enjoy many of the powers usually given to local school boards. To secure funds to purchase land or to erect buildings, the board of trustees makes requisition upon the board of chosen freeholders, who approve such amount as they think needed, up to $350,000. This money must be raised by tax or by issuing bonds or by both means. Funds necessary for the management of the school and for other necessary expenses are provided by the board of chosen freeholders in their annual tax budget, in such amount as they may determine.[70]

Another school unit in which a similar procedure is followed is in a school district composed of more than one municipality and having a population of 10,000 or over, and governed by the provisions of Article VII. In such a district the board of education presents its estimate on or before February 5 to the members of the board of school estimate. That body is composed of the chief executive officer and one member of the governing body of each municipality comprising the school district, and the president and one member of the board of education of the school district. This provision, it is seen, places the school board members of the body in a decided minority as compared with the municipal representatives. After the board of estimate makes its determination of the amount necessary, it reports it to the board of education and to each municipal governing body, and the amount so determined is assessed, levied, and raised in the same manner as in the case of special school taxes in an Article VII district. In the case of capital outlay, the board of education must have a two-thirds vote of its body in order to make a legal request of the board of estimate, which then fixes the amount necessary and certifies it to the board of education and to the municipal governing bodies. In case a bond issue is necessary, it is interesting to note that the bonds are issued by the board of education in its corporate name, and not by the governing bodies of the municipalities, since the school district is made up of what would otherwise be Article VII districts.[71]

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[70] Code, Secs. 566–571.

V. Local School Revenue in Article VII Districts

As was stated previously, the board of education in Article VII districts is no more independent in securing revenue locally for schools than is an Article VI board. The Article VII board must look, however, not to a board of estimate for approval of its budget, but to the voters themselves. The law provides that legal voters of Article VII districts may at an annual or special meeting or election, by the vote of a majority of those voting, raise such a sum or sums by special district tax as such majority may determine for purposes authorized by law.[72] These purposes as enumerated in the law are:

A. to enable the board of education to purchase or take and condemn land for school purposes;
B. to build, enlarge, repair, or furnish a schoolhouse, or to pay a debt incurred therefor;
C. for industrial schools and for manual training;
D. for the current expenses of the schools, which are to include salaries of principals, teachers, janitors, and medical inspectors; fuel; textbooks; school supplies; flags; transportation of pupils; tuition of pupils in other districts with consent of board; school libraries; compensation of district clerk, custodian of school moneys, and of truant officers; expenses of truant schools; insurance; and the incidental expenses of the schools.[73]

It is to be noted that one important item of expense is not submitted to the legal voters. This is the interest on school district bonds and the amount required to retire bonds on maturity. This is a fixed charge not subject to annual approval but is approved by the voters when the issue of bonds is granted. The order for taxes to meet this expense is issued annually by the district clerk to the County Board of Taxation.[74]

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[71] Code, Secs. 522–525.
[72] Code, Sec. 139.
[73] Code, Sec. 139.
[74] Code, Secs. 155 and 665.

There are also certain other items included in the annual budget as a part of the current expense, but not enumerated in the section quoted above. Such amounts are those required in meeting the expense due to the community use of school property,[75] or those incurred in conducting or defending a suit in which the board of education in its corporate capacity is a party.[76]

In any event, the amount granted by the voters must not be more than that designated in the notices of the meeting.[73]

In case the voters at the annual district meeting reject the entire budget or any items necessary to operate the schools, the board of education is required to submit at a special election within twelve days the items rejected, in either the same or less amounts. If the voters at the second election reject any items as submitted, the governing body of the municipality, after consultation with the local board of education, shall within ten days after receipt of the proposed school budget from the school board, certify to the county board of taxation such amounts as they deem necessary to operate the schools efficiently, and such amounts shall be included in the tax levied.[77]

In addition to raising school funds by district tax, Article VII districts may issue school bonds. The board of education, in order to do this, must pass a resolution in which will be framed the proposal or proposals to be submitted to the voters at either annual or special election, and each proposal must state the purpose and amount of bonds for such purpose. If bonds are to be issued for more than one purpose, a proposal may be submitted for each purpose, or several purposes may be combined in one proposal, with the amounts sought stated either separately or as a lump sum. The purposes for which bonds may be legally issued are:

A. purchasing or taking and condemning land for school purposes;
B. improving school lands;
C. building a schoolhouse or schoolhouses or other buildings for school purposes;

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[75] Code, Sec. 130.
[76] Code, Sec. 138.
[77] P. L. 1931, Chap. 308.

D. making additions, alterations, repairs, or improvements upon a schoolhouse or other buildings;
E. purchasing school furniture and other necessary equipment;[78]
F. to redeem and pay off unpaid notes issued for capital outlay, furniture, or equipment.[79]

If the vote is in favor of the proposal, the board of education is empowered to carry out the purposes submitted to vote, and to issue bonds in the amount approved.[78]

In order to secure funds in Article VII districts either by district tax or by bond issue, every step of the procedure must be according to law. The omission of any required step, or any incorrect procedure, is almost certain to invalidate the result. The essential steps are as follows:

A. The board of education must pass a resolution or resolutions by a majority of the board members present and constituting a quorum, in which will be stated the proposals to be voted upon, giving the purposes for which an appropriation by the voters is desired.[78]
B. The board must pass a resolution calling a special meeting, if the action is to be taken by voters at such a meeting:

> Special meetings of the voters of a school district must be called by the board of trustees regularly convened.[80]

C. Notices of the district meeting, whether annual or special, must be posted by the district clerk, at least ten days before the meeting, in at least seven public places in the manner specified by law;[81] these notices must state the proposals upon which the voters will pass in the same language as used by the board of education in its resolution;[78] a further notice must be advertised at least seven days preceding the election in a newspaper circulating in the district.[82]
D. The ballot upon which the legal voters express their desires must contain the same proposals and in the same language as in the resolution of the board of education and in the

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[78] Code, Sec. 143.
[79] Code, Sec. 158.
[80] Bogert v. Trustees, 14 Vr. 358.
[81] Code, Sec. 118.
[82] Code, Sec. 120.

notices of the meeting; stating the purposes for which funds are sought;[78]

E. If it happens to be the annual election, and the election is held in two or more public places, the board must present to each voter in printed form a copy of its annual report, and a copy of the budget for the ensuing year;[83]

F. If the voters approve any of the proposals submitted, the district clerk is required to make certificate under oath of that fact and of other attendant facts required, and forward same to the County Board of Taxation, if for a local tax,[84] and to the Attorney-General for approval, if for school bonds;[85]

G. If the election was to approve raising of funds for local tax, the County Board of Taxation assesses and levies the amount required in the manner provided by law, and same are collected in the manner fixed by statute.[86] If the election was to approve securing funds by school bonds, the board of education, after the approval of the Attorney-General is secured, is empowered to issue bonds to the amount voted, in the manner provided by law.[80]

A great many decisions both by the school tribunals and by the courts have been made on the points just enumerated.

A. The notices of the election.

The Commissioner has held, in the light of opinions expressed by legal authorities and by court decisions,

> * * * that a substantial and not an exact compliance with a statute prescribing the method of calling an election is sufficient in cases where the election is proved to have been made generally known to all the district voters by means of statute or otherwise, and where a full and fair expression of the popular will has been demonstrated at such election. (Brown vs. Street Lighting District, 70 N. J. L. 762). Such substantial compliance, however, is not sufficient where it can be shown that a sufficient number of persons were deprived of knowledge of such election to change the result. (Cyc., page 324, N. 73.)[87]

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[83] Code, Sec. 119.

[84] Code, Sec. 665.

[85] Code, Sec. 154.

[86] Code, Secs. 665–667.

[87] Eckert v. Long Beach Board of Education, S. L. D., p. 21, decision of Com. of Ed., June 27, 1923.

In this case only the newspaper advertisement has been omitted.

A similar decision was made in the North Hanover Township Election contest: In this case it was held that even where one of the seven required notices was posted less than ten days before the election, if there was no evidence or suspicion of fraud, and if the number of voters casting ballots indicated that the public notices had sufficiently advertised the election,

> * * * such irregularities are not of sufficient gravity to justify setting aside the will of the people expressed at such election so clearly and by such a majority.[88]

It should be noted, however, that this case concerned the election of a school board member. It seems probable, however, in the light of the Long Beach decision quoted above, that the principle would apply equally as well to an election on school finances.

No such irregularity is countenanced, however, in respect to the number of days' notice required:

> To sustain an assessment ordered by the inhabitants of a school district called together for that purpose, the proof must be clear that ten days' legal notice of the time, place and purpose of such meeting was given.[89]

B. The resolution of the board stating the purposes for which appropriation is sought, which must be stated in the same language in the notice of the meeting and in the ballot.

The resolution or resolutions must state definitely the purposes for which money is to be raised, and such purposes must be legal:

> The resolution passed at the district meeting must direct the particular purpose for which the money is to be raised, which must be one of the purposes mentioned in the act and must be stated

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[88] In the Matter of the Election for Members of the School Board of the School District of North Hanover Township, State School Report, 1921, p. 317, decision of Com. of Ed., June 21, 1921.

[89] State v. Van Winkle, 25 N. J. L. (1 Dutch.) 73. See also Davis v. Rapp, 43 N. J. L. (14 Vr.) 594. Canda Mfg. Co. v. Woodbridge, 58 N. J. L. (29 Vr.) 134.

in the notices. If money is voted for more than one purpose, the resolution must specify the amount apportioned to each.[90]

This is just as necessary when voting upon a bond issue as when voting for a special school tax:

> It is necessary that it shall clearly and unequivocally appear upon the face of the proceedings for the issue of bonds of a school district, that the bonds are to be issued only for purposes which the statute authorizes them to be issued for.[91]

If money is voted for any purpose not specified in the resolution and notice, such an order is void:

> At a special meeting of the voters of a school district pursuant to notice, it was voted to build a new schoolhouse and to borrow money to buy a lot and pay for the house. The meeting then voted a special tax of $500, and ordered $1600 to be raised in three years, for the lot and schoolhouse. Held, that the order to raise the $500 was void, no purpose to which it was to be applied having been specified as required by law.[92]
>
> A resolution to sell an old schoolhouse passed at the same meeting that it was resolved to raise money to build a new schoolhouse is illegal because no notice was given that the former would be subject for consideration at the meeting.[93]

C. The extent to which the purposes must be specified, itemized and described.

As concerns the annual budget, it is not illegal to appropriate a lump sum for current expenses:

> The phrase ''current expenses'' or ''running expenses'' is sufficiently definite to denote one of the purposes for which a school tax is to be levied.[94]

However, such a word as ''incidentals'' has been held an insufficient description of purpose:

> It is essential that the purpose for which the tax is imposed shall be particularly designated. ''For incidentals'' not sufficient.[95]

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[90] Cochran v. Garrabrant, 32 N. J. L. (3 Vr.) 444. Banghart v. Sullivan, 36 N. J. L. (7 Vr.) 89. Corrigan v. Duryea, 40 N. J. L. (11 Vr.) 266. Schomp v. Cole, 51 N. J. L. (22 Vr.) 277.

[91] Chamberlain v. Cranbury, 57 N. J. L. (28 Vr.) 605. Reversed, Chamberlain v. Cranbury, 58 N. J. L. (29 Vr.) 347.

[92] Duryee v. Greenleaf, 34 N. J. L. (5 Vr.) 441. See also Kaighn v. Browning, 28 N. J. L. (4 Dutch.) 556. Zabriskie v. Trustees, 52 N. J. L. (23 Vr.) 104, 18 A. 683.

[93] Stackhouse v. Clark, 52 N. J. L. (23 Vr.) 291.

[94] Stanton v. Board of Education. See footnote 36 *supra.*

[95] Schomp v. Cole, 51 N. J. L. (22 Vr.) 277.

When expenditures for capital outlay are being voted, an amount requested for land must be specified separately from an amount desired for constructing and furnishing a schoolhouse:

> A certificate on which a school tax is assessed, declaring that the trustees were authorized to procure land and erect thereon a new schoolhouse, and to raise for such purpose a certain sum by taxation, is defective for failure to show how much of the money to be raised was to be appropriated to the purchase of the land, and how much to the erection of the building.[96]

The cost of building and the cost of furnishing, however, may be included in a lump sum, since they represent a single purpose:

> A resolution to raise a single sum for building and furnishing a schoolhouse is not bad for uncertainty, because the amount to be used for building and the amount for furnishing are not separately stated.[97]

A proposal to purchase land must sufficiently locate and describe it to enable the voters to act intelligently:

> Power is given to the voters of a school district at an annual or special meeting to vote and appropriate money (among other things) for the purchase or acquirement of lands and the construction of a schoolhouse at such place in the school district as the school trustees may designate. Held (1), that the trustees must designate to such meeting the place where the lands proposed to be purchased or acquired lie, and the voters must vote on the purchase or acquisition of the lands so designated, (2) That when notice of the object of such meeting should be given, it must contain some description of the lands so designated, and a resolution to purchase lands not so designated is not within the powers of such a meeting.[98]

Under a proposal approved for the purchase of land, the board is authorized to exercise the power of eminent domain:

> A proposal which authorizes the purchase of land shall be sufficient to authorize taking and condemning such land.[99]

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[96] Banghart v. Sullivan. See footnote 90 *supra.*

[97] Stackhouse v. Clark. See footnote 93 *supra.* See also Krug and Ellison v. Board of Education of Township of Woodbridge, State School Report, 1912, p. 109, decision of Com. of Ed.

[98] Zabriskie v. Trustees. See footnote 92 *supra.*

[99] Code, Sec. 143.

If the voters approve proposals to purchase land and to erect a schoolhouse, this action approves other acts which form a necessary part of providing the complete school plant:

> The purchase of land and erection of a schoolhouse includes fencing and grading the lot, supplying the school property with drinking water and equipping the schoolhouse with school furniture.[100]

If the notice contains a resolution to purchase a schoolhouse, the resolution must be construed strictly:

> A notice that the object of the meeting is to purchase a schoolhouse will not warrant a resolution to pay for a schoolhouse already built.[101]

If alternative propositions are contained in a ballot upon a proposal to acquire property for school purposes and to borrow money therefor by means of school bonds, the alternatives must be so worded that the voter will be able to express his views intelligently, and not in such a manner as to make it impossible for him to indicate a choice of the issues presented.[102]

D. The certificate from the district clerk to the County Board of Taxation for assessment of local school tax.[103]

The requirements of the law as interpreted by the courts concerning the certificate to the County Board of Taxation by the district clerk are just as clearly defined as in the case of the notices of the meeting of the voters and in the case of the form of ballot. The requirements concerning this certificate are:

1. The facts must be attested by oath of the district clerk.

> The material facts set forth in the certificate must be verified by the oath of the clerk.[104]

2. It must show that the meeting was called by the trustees.

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[100] Chamberlain v. Cranbury. See footnote 91 *supra.*

[101] Lamb v. Hurff, 38 N. J. L. (9 Vr.) 310.

[102] Codien v. Board of Education of Cliffside Park, 2 N. J. Misc. Rep. 109.

[103] Code, Sec. 665.

[104] Banghart v. Sullivan. See footnote 90 *supra.* Trustees v. Padden, 44 N. J. L. (15 Vr.) 151.

When a meeting of the inhabitants of a school district is held and money voted to be raised by taxation at a special meeting, the previous action of the trustees in calling the meeting should appear in the certificate of the clerk to the assessor.[105]

3. It must show that the notices advertising the meeting met the legal requirements.

Where an assessment of a tax for the purpose of building a schoolhouse is ordered, the sworn certificate stating that the notice of the meeting was given "in accordance with the act" is not sufficient. The certificate should state what the notice was, when and where put up, and all the facts necessary to show that the law has been complied with.[106]

The certificate should state all the facts necessary to show that the law has been complied with, and a certificate stating that notice of the meeting at which the tax was ordered to be raised was given by the district clerk 10 days before the meeting is insufficient in that it does not state how such notice was given, and the circumstances thereof.[107]

It is essential to the validity of the certificate of the district clerk that it set forth that due notice has been given of the amount proposed to be raised at the district meeting.[108]

The certificate of the trustees [district clerk] of the proceedings of a meeting to order money to be raised by taxation, need not set forth the places at which the notices of the meeting were set up; if in the words of the act * * * it is sufficient.[109] [This would require a statement that notices were posted in at least seven public places, including one on each schoolhouse, and publication in a newspaper.[110]]

4. A definite statement must be made of the purposes for which the money was apportioned by the voters.

Under act * * * authorizing the raising of money by a school district for certain specified purposes, a certificate of the trustees setting forth that at a meeting of the taxable inhabitants of the district it was agreed to raise a certain sum "for school

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[105] Lamb v. Hurff, 38 N. J. L. (9 Vr.) 310. Slack v. Palmer, 39 N. J. L. (10 Vr.) 250.

[106] State v. Hardcastle, 2 Dutch. 143; 3 Dutch. 551. Cochran v. Garrabrant, 32 N. J. L. (3 Vr.) 444. Banghart v. Sullivan. See footnote 90 *supra.* Trustees v. Padden. See footnote 104 *supra.*

[107] Quaid v. Trustees of School District No. 37, 49 N. J. L. (20 Vr.) 607, 10 A. 191.

[108] Slack v. Palmer. See footnote 105 *supra.*

[109] Vinsor v. Donahay, 30 N. J. L. (1 Vr.) 404.

[110] Code, Secs. 118, 120 (11).

> purposes,'' in addition to money apportioned, but not specifying the purpose, was invalid and taxes could not be assessed thereunder.[111]
>
> The certificate of the district clerk must show how the amount ordered to be raised was apportioned by the legal voters.[112]
>
> In order to the validity of a school tax, the certificate of the district clerk must show that his apportionment was made by authority of the voters.[113]
>
> A certificate on which a school tax is assessed, declaring that the trustees were authorized to procure land and erect thereon a new schoolhouse, and to raise for such purpose a certain sum by taxation, is defective for failure to show how much of the money to be raised was to be appropriated to the purchase of the land, and how much to the erection of the building.[114]

A rather good summary statement of the requirements to be met in the certificate is the following:

> All the material facts set forth in the certificate should be verified by the oath of the clerk. He should swear that notices of the meeting were set up, and what were the contents of said notices; that the legal voters met at the time and place appointed, and that a majority of voters ordered the tax raised, specifying the object thereof.[115]

If at any district meeting, the voters fail to approve an appropriation of school funds for any purpose, they may legally do so at any special meeting thereafter when the proposal is legally before them, regardless of whether the original proposal was submitted at a regular or at a special meeting of the voters:

> A special meeting of the legal voters of a school district, duly called, may vote to raise money for school purposes, although such appropriation has been refused at the annual meeting.[116]
>
> A special meeting of a school district can vote to raise money to build a schoolhouse, although a similar proposition had been rejected at a previous special meeting held in the same year.[117]

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[111] Cochrane v. Garrabrant. See footnote [90] *supra.*

[112] Corrigan v. Duryea. See footnote [90] *supra.* Trustees v. Padden. See footnote [104] *supra.* Banghart v. Sullivan. See footnote [90] *supra.*

[113] Corrigan v. Duryea. See footnote [90] *supra.*

[114] Banghart v. Sullivan. See footnote [90] *supra.*

[115] Trustees v. Padden. See footnote [104] *supra.*

[116] State v. Lewis, 35 N. J. L. (6 Vr.) 377. Stanton v. Board of Education. See footnote [36] *supra.*

[117] Stackhouse v. Clark. See footnote [97] *supra.*

E. The assessment and levying of the tax.

The laws of New Jersey specify that local taxes shall be assessed and levied by the County Board of Taxation.[118] It is not within the scope of this study to describe the machinery for the assessment of taxes and its operation. They are, generally speaking, assessed in the same manner as other taxes:

> School taxes must be assessed upon the same property and in the same manner as all other taxes.[119]

They are to be levied and applied for the fiscal year succeeding assessment, and not for that preceding:

> School taxes are to be levied and applied for the fiscal year beginning September 1st succeeding the assessment, and not for the preceding year.[120]

If taxes have been assessed illegally, they may be set aside:

> School taxes illegally assessed, will be set aside on application of the persons aggrieved.[121]

An illegal assessment is caused by failure to follow specifically the legal steps described in the preceding pages. Illustrations of reasons for which assessments of taxes have been declared illegal are contained in the following decisions:

> A tax levied to raise a sum of money ordered at such a meeting whereof ten days' notice was not given, must be set aside and cannot be reimposed by the court.[122]
>
> The clerk of the district having directed the assessor to raise, by assessment, the sum of $600 towards the expenses of the schoolhouse and lot. Held, that the clerk had no right to make such apportionment [which is required to be made by the voters themselves], and that such an order was without authority, and the assessment must be set aside.[123]
>
> A special school tax, ordered by a special meeting of the voters, which was not called by the board of trustees, and of which the district clerk did not give notice, will be set aside.[124]

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[118] P. L. 1906, pp. 214–215.

[119] Roll v. Perrine, 34 N. J. L. (5 Vr.) 254.

[120] Elizabeth v. Sheridan, 42 N. J. L. (13 Vr.) 64.

[121] State v. Browning, 3 Dutch. 527, 4 Dutch. 556.

[122] Canda Mfg. Co. v. Woodbridge. See footnote 89 *supra*. See also State v. Van Winkle, 1 Dutch. 73.

[123] Duryee v. Greenleaf. See footnote 92 *supra*.

[124] Apgar v. Van Scykel, 46 N. J. L. (17 Vr.) 492.

VI. School Bonds

In addition to funds derived from the State School Tax and by apportionment from state school moneys in the first instance, and in addition to moneys raised through local taxation, funds for certain purposes in local school units may be secured by floating bond issues. Aside from the fact that Article VII boards must secure the approval of the people for the issuing of bonds, while Article VI boards must have the sanction of the Board of School Estimate, and aside from the fact that in the former type district, the school board issues the bonds, while in the latter the governing body of the municipality performs this function, the steps to be followed are very similar in the two types of districts. The procedure is outlined below:

A. By whom bonds are issued.
   1. In Article VI district, by governing body of municipality after request by school board and appropriation by Board of School Estimate.[125]
   2. In Article VII district, by board of education after approval of voters.[126]

B. Type of bonds (same provision for both Article VI and Article VII districts).
   1. Registered or coupon or both.[127]
   2. Payable in annual installments, commencing not more than two years from date of issue.[128]

C. Purposes and maturity (same provision for both Article VI and Article VII districts).
   1. For purchasing or constructing schoolhouses, with or without equipment.[129]
      (a) Frame construction—20 years;
      (b) Non-fireproof (fire-resisting)—30 years;
      (c) Fireproof—40 years.
   2. To purchase and improve land—40 years.[129]
   3. To construct additions to buildings or reconstruct same.[129]
      (a) Frame construction—15 years;
      (b) Non-fireproof—20 years;

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[125] Code, Sec. 97.

[126] Code, Sec. 143.

[127] Code, Secs. 97, 144.

[128] Code, Secs. 98, 144.

[129] Code, Secs. 99, 145.

        (c) Fireproof—30 years.
    4. To purchase furnishings or equipment—10 years.[129]
    5. If for more than one of above purposes, not over the average of the different periods of maturity assigned to the purposes for which bonds are issued.[130]
    6. To improve lands or construct other buildings than schoolhouses—for same periods as for schoolhouses. Provision in law for Article VI districts only.[131]

D. Sale of the bonds.
    1. When bonds may be sold at private sale, and without advertising or competitive bidding.
        (a) To the trustees of the State School Fund.[132]
        (b) To the board of trustees of Teachers' Pension and Annuity Fund (Article VII districts and third-class cities).[133]
        (c) To Sinking Fund Commissioners for Support of Public Schools (Article VI and Article VII districts).[134]
        (d) To any board, body, or official of the State of New Jersey authorized to purchase such bonds (Article VII districts only).[135]
        (e) When public sale has not been successful, they may be sold to individuals, etc., at private sale, within 30 days after bids for public sale were received.[132]
        (f) If amount is under $10,000.[132]
        (g) To sinking fund of municipality (Article VI district).[136]
    2. Under all other conditions bonds must be sold at public sale, under following conditions:
        (a) At not less than par.[132]
        (b) At public sale upon sealed bids or proposals; or at public auction (Article VI districts).[136]
        (c) Sale must be advertised publicly.
            (1) Article VI districts—at least twice in a local newspaper, the first time at least 10 days before

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[130] Code, Secs. 99, 147.
[131] P. L. 1929, Chap. 9.
[132] Code, Secs. 102, 148.
[133] Code, Sec. 148; P. L. 1929, Chap. 179.
[134] Code, Sec. 366.
[135] Code, Sec. 148.
[136] Code, Sec. 102.

sale, and once in an approved financial periodical.[136]
- (2) Article VII districts—at least once in a local newspaper and in approved financial periodical at least seven days before sale.[135]

(d) What advertisement or notice of sale must contain.
- (1) Article VI district—amount to be obtained, and statement that bonds will not be sold in excess of this amount.[137]
  Article VII district—the amount of bonds offered.[135]
- (2) Maturity of bonds.[138]
- (3) Interest rate or rates. Article VII districts may offer at different interest rates.[138]
- (4) Denominations and other desirable description (Article VII districts).
- (5) Must state bonds will be sold to bidder or bidders complying with terms of sale offering to pay amount required or equal to par value of bonds and take therefor the least amount of bonds.[138]
- (6) If offered at more than one interest rate in Article VII districts, must state that no bids will be considered at higher interest rates if lawful bids at lower rates are received.[135]
- (7) Must require all bidders to deposit certified check for 2% of amount offered.[132]

(e) Maximum legal price for selling bonds.
- (1) Article VI districts—the amount authorized and an additional sum of less than the smallest denomination of the bond.[136]
- (2) Article VII districts—not over par value by more than $1000.[135]

(f) Bids to be opened publicly at time of sale and terms publicly announced, in Article VII districts.[135]

(g) Interest rate on bonds sold to Trustees of School Fund not to exceed 5%.[139]

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[137] Code, Sec. 103.

[138] Code, Secs. 103, 148.

[139] Code, Sec. 365.

3. Contest of validity of bonding election—must be instituted within 20 days after election. Provision in Code for Article VII districts.[140]
4. Approval of legality of bond issue in Article VII district. District clerk to forward certified copies of record of proceedings authorizing bonds, to Attorney-General for approval, and duplicate copies to Commissioner of Education.[141]

E. Delivery of bonds and disposition of proceeds.
   1. Must be signed, sealed, and delivered only within the state, to purchaser only on payment of cash or certified check for full purchase price, except when sold to Trustees for Support of Public Schools.[142]
   2. Proceeds to be paid to custodian of school moneys of district.[143]
   3. Purposes for which custodian may disburse proceeds:
      (a) To pay expenses of issuing and selling the bonds;[143]
      (b) For the purposes for which the bonds were issued.[143]
   4. Unused balances may be transferred by order of board of education to building and repair account of school district.[143]

F. Provision for payment of interest of bonds and retirement of matured bonds.
   1. Article VI districts—city to raise funds in annual budget.[144]
   2. Article VII districts—district clerk to certify to County Board of Taxation amount needed.[145]
   3. Sinking Funds (Local Sinking Fund Commission).

      When school district is situated in municipality having sinking fund commission, and has issued bonds of other type than serial, the municipal sinking fund commission shall have charge of sinking fund for school bonds. Sinking fund commission shall determine amount to be raised by tax for principal on bonds and certify same to County Board of Taxation and Collector, to be assessed, levied, and collected.[146] Sinking Fund Commission to invest funds in approved securities[147] and make annual report to local board of education.[148] Official papers and securities, etc., of Sinking Fund Commissions to be inspected by State Commissioner of Municipal Accounts or agents, who shall determine method of keeping books and records.[149] When there is no local sinking fund commission, the custodian of school moneys shall have charge of sinking fund moneys and securities.[150]

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[140] Code, Sec. 151.

[141] Code, Sec. 154.

[142] Code, Sec. 366.

[143] Code, Secs. 103, 150.

[144] Code, Sec. 104.

[145] Code, Sec. 155.

G. Bonding capacity for school purposes.
  1. Article VI districts.
    (a) Not over 3% of taxable valuation of real and personal property unless by concurrence and consent of governing body of municipality.[151]
    (b) Not over 6% of taxable valuation (after deducting amount in sinking fund), unless by consent of voters.[151]
    (c) In no case, even by consent of voters, over 9% of taxable valuation.[151]
  2. Article VII districts.
    No bonding limit provided by law or otherwise.

H. Records of bond issues.

Immediately upon sale of bonds, the district clerk of each school district must file certified copies of proceedings relating to issue of bonds and copies of legal opinions relating thereto with Commissioner of Municipal Accounts of state.[152]

(See also D, 4, concerning report of proceedings to Attorney-General and Commissioner of Education.)

In addition to rulings and decisions quoted earlier in this chapter,[153] which refer to the raising of money locally by bonds or otherwise in Article VI districts, a number of additional decisions have been made which refer to school bonds.

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[146] Code, Secs. 367–370.

[147] Code, Sec. 659.

[148] Code, Sec. 369.

[149] Code, Sec. 658.

[150] Code, Sec. 283.

[151] Code, Secs. 104, 107.

[152] Code, Sec. 650.

[153] See pp. 225–237.

A. The nature of school bonds.

1. Not mere mortgages.

Bonds issued by school districts are not mere mortgages, notwithstanding the statutes make the bonds a lien on the property of the inhabitants of the district, but are evidences of legal debts of the districts issuing them.[154]

2. Negotiable instruments.

Municipal bonds payable to bearer since the passing of negotiable instruments act held negotiable instruments, the rights of the holders of which were governed by that act.[155]

Coupon bonds issued by a municipal corporation under competent legislative authority and payable to bearer, are commercial securities, the title to which passes by delivery.[156]

Under the Negotiable Instruments law, a board or municipal governing body must use proper care to see that delivery is not made of the bonds until proper legal payment therefor is received.

That school bonds were issued and delivered to the purchaser without requiring payment by him held not to affect the validity of the execution and delivery as against a subsequent holder in due course, under Negotiable Instruments Law.[155]

B. When school bonds are legally issued.

1. When the purposes for which they are issued are legal.

It is necessary that it shall clearly and unequivocally appear upon the face of proceedings for the issue of bonds of a school district, * * * that the bonds are to be issued only for purposes which the statute authorizes them to be issued for.[157]

2. Only when proceedings have been approved by the Attorney-General.

A bank agreed in writing to purchase school bonds to be issued and to pay for them ''on or about the time of the signing of the contracts for the construction of a school building about to be erected on W street on the site known as the K site," said site was that authorized and described in the preliminary proceedings and special election required by law which had been approved by the Attorney-General as complying with the statutory requirements. Subsequently, the site was abandoned, another chosen, and bonds issued based on a second election describing such site. It did not appear that these later proceedings were approved by the Attorney-General. Held, that the bonds issued under such latter proceedings were not a compliance with the contract.[158]

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[154] McCully v. Board of Education, 63 N. J. L. (34 Vr.) 18, 42 A. 776.

[155] Linbarger v. Board of Education of West New York, 83 N. J. L. 446, 85 A. 235.

[156] Fifth Ward Savings Bank v. First National Bank, 48 N. J. L. (19 Vr.) 513.

[157] Chamberlain v. Cranbury, 58 N. J. L. (29 Vr.) 347.

If bonding proceedings are not approved by the Attorney-General, bonds may not be sold and hence temporary loans may not legally be secured.[159]

C. School bonds (Article VII districts) may be executed specifically by board action, or under certain circumstances, by its officers.

Resolution of a board of education authorizing the president and clerk to execute certain school bonds held to confer complete authority on such officers for the purpose.[155]

D. Principal and interest on bonds in Article VI districts must not be paid out of school funds.

Bonds are an indebtedness of the city and not of the school district and school moneys cannot be used to pay any part of the principal or interest due on school bonds.[160]

VII. Federal Sources of Revenue

Heretofore in this chapter, three general sources of revenue for local school districts have been discussed. These are: (a) state funds or moneys, (b) local school tax, and (c) school bonds issued by the local school unit or by its corresponding municipal government. There remains to discuss certain Federal sources.

A. Under acceptance of the Smith-Hughes Act.[161]

It is sufficient at this point to indicate that under the terms of this act, certain appropriations from the Federal government are made available to the State of New Jersey, and are devoted:

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[158] Bank of Bergen Co. v. Board of Education, 84 N. J. L. (55 Vr.) 694.

[159] Lendstrom v. Board of Education of Township of Hillsborough, Somerset Co., State School Report, 1929, p. 58, decision of Com. of Ed., July 23, 1928.

[160] Board of Education of Atlantic City v. Beyer, S. L. D., p. 75, decision of Com. of Ed., May 11, 1914, affirmed by St. Bd., Nov. 7, 1914.

[161] Act of Congress, approved Feb. 23, 1917, accepted by the State of New Jersey, P. L. 1917, Chap. 119.

1. to the promotion of vocational schools;
2. to the promotion of education in agriculture and the trades and industries; and
3. to the training of teachers of vocational subjects.

The State Treasurer is the custodian of these moneys, and the State Board of Education constitutes a State Board of Vocational Education to carry out the provisions of the act. To secure such federal funds, the State of New Jersey appropriates out of its treasury such funds as are necessary.[162]

B. Under acceptance of the Federal Rehabilitation Act.[163]

Under the terms by which the provisions of this act were accepted for New Jersey, Federal funds are secured for the purpose of providing for the support and supervision of courses for vocational rehabilitation, conditioned upon the appropriation of further funds by the State of New Jersey. The administration of the program is jointly in the hands of the State Board of Education, the State Commission for the Rehabilitation of Physically Handicapped Persons, and the Workmen's Compensation Bureau of the State Department of Labor.[164]

C. Under the acceptance of the Federal Smith-Lever Act.

By the acceptance of the provisions of the Smith-Lever Act in 1915, the New Jersey State College of Agriculture receives from the Federal government certain appropriations for extension work in Home Economics and in Agriculture. These funds are supplemented by equal appropriations from the state legislature for the same purpose. The actual work is performed under the supervision of the College of Agriculture by county agencies, chiefly the county farm agent and the home economics extension workers.[165]

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[162] Code, Secs. 453–456.

[163] Act of Congress, approved June 2, 1920, accepted by the State of New Jersey, P. L. 1920, Chap. 374.

[164] Code, Secs. 482–484.

[165] P. L. 1915, Chap. 155.

VIII. THE CUSTODY, CONTROL, AND DISBURSEMENT OF SCHOOL FUNDS

A. Custody of State and Federal Revenues for Education

The State Treasurer is the legal custodian of all state and Federal school moneys in the hands of the state until such time as they are paid out on proper warrant and order of the Comptroller. Such moneys include the State School Fund,[166] the State School Tax,[167] the Railroad Tax,[168] the Teachers' Pension and Annuity Fund,[169] the Smith-Hughes Funds,[170] and the Vocational Rehabilitation Fund.[171]

As was indicated in an earlier portion of this chapter,[172] state apportionments for local school purposes are, for the most part, paid over to the county collectors, who also serve as custodians for such funds until, on order of the County Superintendents, they pay them out to local custodians of school moneys. Some payments from the state are made directly, however, to the custodians of school moneys in the local school districts.

The county collector can exercise no discretion once he is legally ordered to pay the funds to the custodians of school moneys of the local districts:

> A county collector is not required or permitted by the "act to establish a system of public instruction" to exercise any discretion as to how much of the state appropriation the several township collectors [custodians] in the county are entitled to receive from him.[173]

The fact that some county or state taxes from the local district have not been paid over to the county collector does not justify him in holding back the state apportionment in order to enforce payment of such taxes:

> A county collector, upon mandamus, will be ordered to pay over to the treasurer of a town or township collector the amount of school moneys apportioned to said town or township, for which the collector holds the order of the county superintendent, although the town treasurer or township collector may owe to the county collector moneys due for state and county taxes.[174]

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[166] Code, Sec. 256.

[167] Code, Sec. 269.

[168] Code, Sec. 506.

[169] Code, Sec. 546 (14).

[170] Code, Sec. 454.

[171] Code, Sec. 485.

[172] See p. 208.

[173] Herder v. Hunterdon, 36 N. J. L. (7 Vr.) 363.

[174] Plainfield v. Sheridan, 45 N. J. L. (16 Vr.) 276.

Since the district has already expended the money for the purposes for which the apportionment is granted, the county collector may be compelled to pay it over:

> A mandamus will be allowed for the payment of the county superintendent's order for the state appropriation for public schools, where the moneys have been applied for school purposes in the preceding year, beginning January 1st.[175]

Nor can the county collector pay such moneys over except on the order of the county superintendent. If he does so, he is responsible for the moneys:

> The county collector of each county shall receive and hold in trust the state approprĭation for public schools belonging to his county, and pay the same to the collectors of the several townships and to the city treasurers of the cities of his county, only on the orders of the county superintendents, and is responsible for these moneys if otherwise expended.[175]

Furthermore, he has no power to reduce the amount apportioned:

> The notion that a county collector can in any case reduce the amount by setting up some counter claim, whether in his own behalf or in behalf of his county, and whether against the township collector, personally, or against his township, is neither justified by the language nor consistent with the policy of our school laws.[173]

B. The Custody of School Moneys in the Local School District

In Article VI school districts, the city treasurer is ex-officio the custodian of school moneys.[176] While the same person performs the two duties, the offices are distinct and separate:

> The offices of City Treasurer and Custodian of School Moneys are separate and distinct offices, although held by the same person, and as the Common Council or other governing body of the municipality in which the school district is situate, is prohibited from controlling, or attempting to control, the funds of the school district, * * * the Custodian is under the control and direction of the Board of Education. * * * The Custodian of School Moneys holds an office created by the School Law, and not by any provision contained in the charter of the city, and as such officer must be governed solely by the provisions of the School Law.[177]

In Article VII school districts, the board of education may designate the collector as its custodian of school moneys, but in the absence of such designation, the custodian of municipal funds is to serve in that capacity. If the district contains more than one municipality, the board of education is at liberty to appoint a suitable person to serve. In all districts the custodian is required to be under such bond and with such sureties as the board of education shall direct, but in no case less than the amount apportioned to the district by the county superintendent.[178] Since he is to be under bond, it has been ruled that he, and not the school board, at least in city school districts, has the power to select the depository of school funds:

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[175] Elizabeth v. Sheridan, 42 N. J. L. (13 Vr.) 64.

[176] Code, Sec. 82.

[177] Board of Education of Atlantic City v. Beyer, S. L. D., p. 75, decision of Com. of Ed., May 11, 1914, affirmed by St. Bd., Nov. 7, 1914.

> The Custodian of School Moneys of Bayonne, * * * who according to section 81 of the School Law holds his office by virtue of being City Treasurer, must be considered to be covered by his official bonds as treasurer and in no way compelled to comply with the direction of the Board of Education as to the place in which he shall deposit school moneys.[179]

As custodian of local school moneys, his duties are purely ministerial, or prescribed exactly by statute, and he has no discretion in the matter or the manner of their performance:

> Where money was assessed, levied and collected according to the provisions of a statute, and turned over to the town collector [custodian], he occupies the legal status of trustee of the fund, and as such trustee he cannot question the constitutionality or legal propriety of the statute; his duty is in nowise discretionary, but entirely ministerial.[180]

As the local custodian, he receives and holds in trust all school moneys belonging to such school district, from whatever source received. This includes moneys apportioned directly by the Commissioner of Education to the school district out of the Reserve Fund and the Emergency Fund;[181] moneys apportioned by the county superintendent out of funds in the hands of the county collector, on the basis of teacher quotas, transportation of pupils, etc.;[182] and moneys received from local tax levy for the schools.[183]

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[178] Code, Sec. 281.

[179] Board of Education of City of Bayonne v. Ryan, S. L. D., p. 303, decision of Com. of Ed., Apr. 11, 1927.

[180] Downs v. Boonton, 99 N. J. L. 40.

[181] Code, Sec. 281.

[182] See Table III, pp. 214–215.

[183] Code, Sec. 666.

C. The Control of Moneys in the Local School District

In a very real sense, the board of education in both Article VI and Article VII districts is subject to control in the securing of school funds and in their apportionment. In Article VI districts the most important legal control has been placed in the hands of the Board of School Estimate.[184] Indirectly, but none the less potently, the mayor or chief executive officer also exerts great power in this respect.[184] In Article VII districts, the control is exercised by the voters.[185] As soon as the funds are in the hands of the custodian of school moneys, however, the board of education is in supreme control of the funds, subject only to the provisions of the law and the limits set by the constitution. This control over school funds in their hands is expressed clearly in the school law itself:

> Nothing in this act shall be construed as giving to the township committee, common council or other governing body of any municipality any control over moneys belonging to the school district in the hands of the custodian of the school moneys of said district, but said money shall be held by such custodian in trust, and shall be paid out by him only on orders legally issued and signed by the president and district clerk or secretary of the board of education; any ordinance, by-law or resolution of a township committee, common council or other governing body of any municipality attempting to control such moneys, or which shall in any way prevent the custodian of the school moneys of the school district from paying the orders of the board of education as and when they shall be presented for payment shall be absolutely void and of no effect.[181]

This independence of boards of education in the control of their expenditures was further emphasized in Shaner v. Millville. In 1926, a contractor, upon the construction of a new high school in Millville, was subject, under the terms of his contract, to a penalty for delay in completing the work beyond the time specified in the contract. The board of education, feeling that he had completed the work satisfactorily, was not inclined to enforce the time penalty clause and was about to pay him in full. The Board of Commissioners of the municipal government and Kirk, the director of revenue, objected to allowing the penalty to go unenforced, claiming that by refusing to deduct the penalty from the contract price, the board of education was defrauding the city as well as the school district. Upon application, the Supreme Court made an order permitting the city of Millville, through its director of revenue and finance, acting as such and as a resident in and taxpayer of said city, to intervene in any action by the contractor against the board of education to recover the amount due on the contract. The Supreme Court vacated the order of intervention, refusing permission to the city of Millville to intervene and defend actions against the board of education. The decision was in part as follows:

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[184] Code, Secs. 96, 97, 107.

[185] Code, Secs. 139, 143.

> Under the School Law (Comp. Stat., p. 4740) it is provided, under section 45 of article 6, that ''a board of education in a city school district shall be a body corporate and shall be known as and called 'the board of education of ——— in the county of ———, and shall adopt an official seal'.'' Under section 94 of article 7 of said law it is provided as follows:
>
> ''A board of education may, in its corporate capacity, sue and be sued, complain and defend in any court of law and equity, and employ counsel therefor, and the amount of the expenses incurred by said board in conducting or defending any such suit shall be certified to the assessor by the president and district clerk of such board, and said amount shall be assessed and collected in the next annual tax levy.''
>
> From these sections it is our opinion that the School Law makes the board of education a corporation, by which it is empowered to enter into contracts for the erection of schools, &c., and that matters growing out of such contracts are within the sole control of the board of education, and a municipal corporation has no standing to interfere with such action as the board of education may propose to take in the matter of adjusting differences under a contract for the erection of a school building.
>
> It is only in certain classes of cases that a taxpayer may intervene. These provisions are found in sections 44 and 45 of the Practice act of 1903. Neither as a taxpayer nor as director of revenue and finance has the intervenor, Mr. Irwin W. Kirk, any standing in this action. To countenance such an intervention is to transfer the power given to a board of education to the municipal government. This is not the scheme of the legislature. It would subordinate the board of education, which is an independent corporation, to the municipal corporation, to the municipal body. It would make the members of the board of education manikins to be controlled by the action of the city. This, we do not think, as we have intimated, was the scheme of the legislature appertaining to a board of education. In many instances the members of board of education are elected. The law certainly does not mean that they are elected to be mere figureheads of the municipal government without the power to exercise discretion in matters appertaining to the government of schools. The mere

fact that the principal and interest of bonds issued for school purposes has to be met by the city affords no sufficient grounds to subordinate a board of education to the whim or pleasure of the municipal government.[186]

It is therefore evident that not only under the provisions of the law governing the duties of custodians of school moneys, but by the interpretation of the courts, under the laws governing corporate powers of school districts, the latter are not, in either the matter of expenditure of school funds due under contracts, nor, in fact, in the general conduct of business, subordinate to the municipal government and its officers.

Futhermore, it was long since decided by the courts that the local collector or custodian is not subject to the control of the municipal officers in respect to school funds:

> A township collector is not required to pay over to the township committee taxes which he is directed by the legislature to pay over to other persons or to retain in his own keeping as their official custodian.[187]

The extent to which local custodians of school moneys may exercise control over the disposition of funds in their charge will be discussed in the following section.

D. The Expenditure of School Moneys

1. In Article VI districts, the procedure in disbursements is as follows:
    - (a) A claim or demand is presented to the board. Such a claim must be fully itemized, and must be authorized by law and by the rules of the board of education.[187]
    - (b) If approved by the board of education, that body appropriates the money to pay this claim.[188] Thereupon, a warrant, signed by the president and secretary of the board, is drawn on the custodian of school moneys of the district.[189] This warrant must specify the object for which it is given and is made payable to the order of the person entitled to receive it.[190]

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[186] Shaner et al. v. Board of Education of Millville et al., 6 N. J. Misc. Rep. 671.

[187] Hardyston v. Harden, 68 N. J. L. (39 Vr.) 76.

[188] Code, Sec. 81.

[189] Code, Sec. 82.

[190] Code, Sec. 279.

In the case of the payroll for teachers and other employees, however, one warrant, accompanied by a certified payroll, may be made to cover the entire amount, and this be kept in bank as a separate payroll account, against which the custodian draws checks in favor of the employees individually.[190]

(c) The warrant accompanied by the itemized statement of the claim is forwarded to the comptroller or auditor or other person authorized by law to audit claims against the municipality, who is also designated by law as the auditor of the school district. The auditor, after examining the claim, may do one of two things:

(1) He may approve the claim and countersign the warrant and forward it to the city treasurer for payment.

(2) He may, if he finds the claim incorrect or improper, return the warrant and statement to the secretary of the board of education with a statement of reasons for his disapproval. In case of an error which he is competent to correct, the secretary is to make the correction and return to the auditor, otherwise, he is to present the matter to the board at its next meeting. The board, if it finds the claim correct, shall, by a majority of all the members of the board, order it paid, and shall return the papers to the auditor, who is required to countersign the warrant and forward it to the city treasurer for payment.[189]

2. In Article VII districts, the following procedure is required:

(a) A claim or demand is presented to the board, which must be fully itemized, and which, if in excess of five dollars, must be accompanied by an itemized statement certifying that the goods or services have been delivered or rendered and that no bonus or reward has been received in connection therewith, and that the bill is true and correct.[191] An exception to the above procedure may exist in case the board authorizes the district clerk to purchase supplies for the schools within legal limits and to present an itemized statement with his affidavit attached.[191]

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[191] Code, Sec. 134.

   (b) Any bill or claim, before being paid, must be presented and passed upon by the board of education at a regularly called meeting.[192]

   (c) If the claim is approved, a warrant signed by the president and district clerk is drawn upon the custodian of school moneys. This warrant must specify the object for which given, and must be made payable to the order of the person entitled to receive it. The same exception as in Article VI districts may be made in case of the payroll.

3. Restrictions upon payments from certain school funds as imposed by law.
   (a) Boards of education are forbidden, under penalty of losing from state apportionment double the amount misappropriated, to use any of its school moneys except those from local district tax, for other purposes than the payment of teachers' salaries, fuel bills, transportation of pupils, and the tuition of pupils attending schools in adjoining districts. This definitely restricts the use of all funds apportioned by the state.[193]
   (b) A further restriction specified in the use of the Railroad Tax is that it shall not be used in any school district to pay in part or in whole any note or other obligation incurred, or any bond of any kind issued by the municipality or by the board of education, nor for any purpose but "for the support and maintenance of the free public schools of such municipality or school district."[194]
   (c) In case school bonds are issued by a school district, the proceeds must be disbursed by the custodian of school moneys only for the expenses of the issuing of the

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[192] Code, Sec. 133.
[193] Code, Sec. 334.
[194] Code, Sec. 514.

bonds, and for the purposes for which the bonds were issued. In case of unused balances, such may, by vote of the board, be transferred to the building and repair account of the district.[195]

Under the legal provisions just set forth, a number of important decisions and rulings have been made.

1. School money can be expended for educational purposes only, and then only for purposes authorized by law:

> Money raised or appropriated for a school fund cannot be lawfully expended by the town committee for any other than educational purposes.[196]

As concerns the want of power of a board to expend funds for unauthorized purposes, the decision in Lee v. Trustees has expressed an important principle:

> The trustees here claim that this third section vests in them the power in their discretion to apportion the moneys in the school treasurer's hands to any of the purposes for which money may lawfully be raised under the general school law of the state. * * * The authority asserted to exist in the trustees, implies the right to divert money from a use for which it has been expressly ordered by a vote of the inhabitants.
>
> There is no language in this legislation which will bear such an interpretation. The statute does not say that the moneys received by the treasurer for school purposes shall be paid out for such uses as shall be authorized by the trustees; but they shall be paid out on the written order of the trustees, which order shall state the purpose for which it is given. The object of requiring the order to state the purpose is not to enable the trustees to divert the fund to an object different from that for which it is raised but, on the contrary, to prevent them from doing so.[197]

An equivalent ruling is the following:

> Moneys appropriated for a specific purpose cannot be used for any other purpose without the consent of the appropriating power. The action of the Board of Education, therefore, in using the money appropriated at the meeting of April 18th for the purchase of a

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[195] Code, Secs. 103, 107 (7), 150.

[196] Hoboken v. Ivison, 29 N. J. L. (5 Dutch.) 65.

[197] Lee v. School Trustees, 36 N. J. L. (9 Stewart) 581.

> plot of ground selected at said meeting to purchase the plot selected at the meeting of June 30th was illegal.[198]

2. All bills or claims must be itemized as required by law:

> The law expressly requires that all bills presented to the auditor shall be itemized. Unless a bill is properly itemized, it is impossible for the auditor to perform the duty cast upon him by the statute. * * * He must have clearly stated in the bill he is asked to approve such items as will enable him to act intelligently when he approves or disapproves it.[199]

This law, however, is to be interpreted reasonably and in accordance with the requirements of the particular situation:

> It would hardly seem to be the intent of the statute that a detailed itemizing be made of architects' expenses as would be necessary in case of purchase of goods, etc.[200]

3. It is mandatory upon the auditor in a city school district to countersign a warrant which has been returned to him by the board of education after the latter body has overruled his objections:

> So long as the total appropriation [by Board of School Estimate] holds out, the auditor has no option after a rejected claim has come back with the imprimatur of the Board of Education, but to countersign the warrant; and leave the public to its remedies by indictment and otherwise in case of a malfeasance in office by the board.[201]

4. When warrants are properly drawn and approved, the custodian of school moneys has no discretion but to pay them, except in the case of the proceeds of bond issues, and he is not responsible for the legality of the expenditure:

> The township collector paying out school moneys on statutory orders is not responsible for the application the school trustees have made of the money.[202]

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[198] Hartpence v. Board of Education of Kingwood Township, S. L. D., p. 108, decision of Com. of Ed., Nov. 1, 1912, affirmed by St. Bd., Mar. 1, 1913.

[199] Board of Education of Atlantic City v. Townsend, S. L. D., p. 293, decision of Com. of Ed., May 11, 1914.

[200] Bayonne Board of Education v. Evans, S. L. D., p. 291, decision of Com. of Ed., Mar. 17, 1924, affirmed by St. Bd.

[201] Hayes v. Townsend, S. L. D., p. 296, decision of Supreme Court, Nov. 17, 1915, affirming decision of St. Bd., affirming decision of Com. of Ed., July 24, 1914. See also Bayonne Board of Education v. Evans. See footnote [200] *supra*.

[202] Zimmerman v. Mathe, 49 N. J. L. (20 Vr.) 45.

> Of all school funds except the proceeds of a bond issue, the Custodian of School Moneys is according to Section 274, Article XVIII of the School Law, merely a custodian in the most literal sense of the term and must pay out the school moneys held in trust by him by order of the Board of Education and on duly executed warrants without any exercise of discretion whatever on his part, and the responsibility is on the board of education alone for any illegal expenditure of school moneys made by it.[203]
>
> It has also been held that the custodian of the moneys of a school district in the payment of orders is not responsible for the application the school board has made of the money when such orders come to him drawn according to law.[204]

The same rule has been held to apply to the transferring of funds from one account to another:

> It is the opinion of the Commissioner that the Respondent [custodian] has no choice but to transfer the $25,000 from the Current Expense to the Building and Repairs Account as ordered by the Board of Education by resolution and by a duly executed warrant, and that the responsibility therefor rests not with the custodian but entirely with the Bayonne Board of Education.[205]

While the School Law provides for transfer of unused balances of the proceeds of bond issues for capital outlay purposes, to the building and repair account of the school district,[206] under at least one condition the custodian of school moneys is justified in refusing to make the transfer:

> While * * * the school auditor had in the Commissioner's opinion no legal justification for refusing to countersign the warrant * * * when sent to him the second time by the Bayonne Board of Education after it had been passed over his objections, the school custodian is in the Commissioner's opinion merely performing his obligation under the statute when * * * he refuses to obey the order of the board of education to transfer any funds from the Horace Mann School construction account to the building and repair account as long as there is any legal possibility of such money being needed for the purpose for which it was originally appropriated.[203]

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[203] Board of Education of City of Bayonne v. Ryan and Evans, State School Report, 1926, p. 39, decision of Com. of Ed., May 13, 1926.

[204] Board of Education of Borough of Hampton v. Melick, S. L. D., p. 302, decision of Com. of Ed., Feb. 9, 1916, affirmed by St. Bd., June 3, 1916.

[205] Board of Education of City of Bayonne v. Ryan, S. L. D., p. 47, decision of Com. of Ed., Dec., 1926.

[206] See footnote [195] *supra.*

IX. FINANCIAL ACCOUNTING AND REPORTS

So far as the statutes are concerned, the authority for setting up a uniform financial accounting and reporting system for New Jersey school districts is divided, or at least not clearly indicated. In the first place, a uniform accounting system is required in the following:

> The State Board of Education * * * shall prescribe a uniform and simple system of bookkeeping for use in all school districts, and compel all school districts to use the same.[207]

Under the 1903 act, it is provided that

> * * * the Commissioner of Education shall prepare and cause to be printed forms for making all reports and conducting all proceedings under the school laws of this State.[208]

By the authority of a later act, however, this power as concerns financial reports was given to the Commissioner of Municipal Accounts:

> The Commissioner of Municipal Accounts shall prescribe the form of reports and statements to be made to the State in connection with the sinking fund, financial statement and any other reports or statements in connection with the financial condition of any municipality, county or school district, as provided in this or any other statute.[209]

This act further requires that the Commissioner of Municipal Accounts forward to the sinking fund commission or to the proper official of the school district blank forms for making reports and statements.

The law makes it the duty of the custodian of school moneys of the school district to file an annual statement of the finances of the school district with the Commissioner of Municipal Accounts within sixty days after the close of the fiscal year, upon forms prescribed by that officer.[210]

It seems evident that with such division of authority on the matter of accounts and reports, it is only by agreement between the departments concerned that a unified and co-ordinated system has resulted.

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[207] Code, Sec. 2 (I).
[208] Code, Sec. 29 (P. L. 1903, Special Session).
[209] P. L. 1917, Chap. 154 (Cum. Sup., p. 3343).
[210] Code, Secs. 655–657.

In addition to the annual financial reports which are to be submitted to the state authorities, each board is required to submit to its constituents an annual report showing the financial condition of the district, except that in Article VII districts this is required only when the annual election is held in two or more public places, in which case a copy must be presented to each voter.[211]

X. TEMPORARY LOANS TO SCHOOL DISTRICTS

The School Law provides that a board of education may borrow sums of money on temporary loans, as follows:

A. In anticipation of collection of taxes or of issue of permanent bonds, when such tax levy or bonds have been authorized.[212]

B. In anticipation of tax collections, may borrow not over one-half the amount appropriated for current expenses and for repair of schoolhouses;[213]

C. In anticipation of apportionment of Railroad Tax, but not over 80% of amount apportioned.[214]

The opinion of the Assistant Commissioner of Education in charge of legal affairs, however, is that since the enactment of the law providing for the collection of taxes twice each year,[215] the provisions of the law for temporary loans in anticipation of tax collections are obsolete and of no effect. In respect to loans in anticipation of Railroad Tax apportionment, the Assistant Commissioner says:

> It is probable that districts might be able to borrow in anticipation of the Railroad Tax, but this amount is now very small and taken together with the fact that requisitions can be made upon the municipal treasurer where the money is needed, there is no resort to this provision.[216]

XI. SUMMARY

In providing funds for school support, New Jersey has recognized the need for state revenue as well as for local funds. It has likewise accepted the provisions of various Federal acts which bring certain subsidies from the Federal government. Furthermore, it requires and authorizes local revenues for school purposes. The state revenues are used to defray the expenses of state educational activities and obligations, and to defray the cost of county educational services. While the State School Tax is essentially a local tax, 10% is used to pay the tuition of pupils who are not rightfully a charge upon any school district, and to provide assistance to needy districts.

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[211] Code, Secs. 68, 119.

[212] Code, Secs. 105, 108.

[213] Code, Secs. 69, 127 (XIV).

[214] Code, Sec. 514.

[215] P. L. 1918, Chap. 236, as amended, P. L. 1920, Chap. 224.

[216] Letter, Assistant Commissioner C. J. Strahan, Dec. 29, 1931.

In Article VI districts the state has handed over to the municipal authorities a considerable degree of control over the provision of school funds by giving the Board of School Estimate the power to appropriate or to refuse to appropriate school funds. In Article VII districts the boards of education are dependent to a large degree upon the expression of the popular will not only in securing bond issues, but also for the approval of items in the annual budget.

The only point at which the independence of the local school authorities in their finances seems complete is in the expenditure of the funds, in which they are subject only to the usual control of the law and of the courts. It may be questioned of how great value this control is, however, when the district board has so small a degree of control over the amount to be provided.

CHAPTER IX

THE LEGAL STATUS OF THE PUBLIC SCHOOL PROGRAM OF STUDIES

I. General Considerations

A. Limitations Set for This Chapter

In this chapter consideration will be given to the public school program of studies only on the elementary and high school level. Anything above the high school level will be found included in the chapter upon "Higher Education."[1]

B. Terminology

Some difficulty in analyzing the purposes of the law and the functions of the various agencies is met owing to the fact that the School Law uses the term "course of study" with two if not three distinct meanings. Sometimes it seems to be used in the sense usually assigned to "program of studies," which has been defined as "the entire offering of subjects and courses in a given school, including its plan of organization and other features of its administration."[2] Elsewhere it is evidently used in the accepted sense of "curriculum" as usually applied to the secondary school, that is, "the arrangement of courses or subjects taken by a pupil or a group of pupils during progress through a secondary school."[2] At still other times it is probably used in the proper meaning of the term "course of study," that is, "the complete outline of work in a given field or subject."[3] The sense in which it is used in the School Law or in the Rules and Regulations of the State Board of Education in any instance will be made evident, where possible.

As "program of studies" is used in this chapter, it will include all activities or observances included as a part of the school work, by which the pupils are brought into contact with and made acquainted with those ideals or practices which the state law or other legal authority permits or requires, as well as the subjects of study which form the major portion of the offering of the school.

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[1] See Chapter IV, pp. 62, 64–65, 69–70.

[2] Koos, Leonard V.: *The American Secondary School,* p. 516. Ginn and Company, 1927.

[3] *Ibid,* p. 371.

C. General Functions of Administrative Bodies and Officials

By the provisions of the School Law, the authority to prescribe the program of studies for local public schools is placed in the hands of several authorities:

1. The local school board:

> Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include * * * courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years.[4]

In this case, the expression "facilities * * * shall include * * * courses of study" is probably to be interpreted to mean that the local district or board shall provide the opportunity for such children to pursue these courses of study, either in their own district or in another district. This, at least, is the view held in an opinion of the Commissioner of Education in a case where that official was upheld in his judgment by the State Board of Education and by the Supreme Court.[5]

In Article VII districts, the local board,

> in connection with the County Superintendent of Schools, [is] to prescribe the course of study to be pursued in the school or schools under its charge.[6]

In any district, the course of study is to be adopted or altered only by a majority vote of the whole number of the board.[7]

2. The county superintendent of schools.

Not only by the provision previously quoted is the county superintendent to co-operate with the local board in providing courses of study, but by the rules and regulations of the State Board he is more specifically charged with the same duty for the schools under his supervision:

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[4] Code, Sec. 196.

[5] Phillips v. Board of Education of township of West Amwell, S. L. D., p. 226, decision of Com. of Ed., Dec. 15, 1925; affirmed by St. Bd., Jan. 9, 1926, and by Supreme Court, Jan. 19, 1927.

[6] Code, Sec. 127 (VII).

[7] Code, Sec. 89, 132.

> The county superintendent shall, in the manner now provided by law, and subject to the approval of the Commissioner of Education, prepare and establish a uniform course of study and a standard of graduation in the schools under his supervision.[8]

Since this rule requires this to be done "in the manner now provided by law," it seems probable that the local board in this provision is conceded a part in the responsibility.

3. The Commissioner of Education.

Likewise, the Commissioner of Education is given the authority to prescribe courses of study:

> The Commissioner of Education shall, with the advice and consent of the State Board of Education * * * prescribe a minimum course of study for the elementary schools and for the high schools or for either, if in his opinion it is advisable to do so.[9]

It is evident that by this provision the Commissioner has the authority to prescribe a minimum course of study for schools, which probably therefore means a minimum program of studies, but only with the approval of the State Board. As indicated in the authority given to the county superintendent by the State Board rules, the Commissioner has also the authority to approve courses of study when prescribed by the former officer.[8]

4. The State Board of Education.

The function of the State Board of Education with respect to the program of studies of the public schools is that of approval. This appears not only from the provision just quoted, but in nearly all other cases where the authority to formulate programs is given. This will appear in the discussion which follows.

D. The Factor of Time in the Program of Studies

While it cannot be said that the length of time required by law for the maintenance of public schools is an essential factor in the determination of the school program, it is unquestionably one element in determining the work which may be accomplished. The law forbids the apportionment of state school funds to districts which do not maintain a term of nine months.[10] The school month, at least so far as it concerns the employment of teachers, is to consist of twenty school days, or four weeks of five school days each.[11] It would therefore seem that the minimum school year is considered to be one hundred eighty school days, and the program of studies is, at least in its minimum requirements, probably based upon this time element.

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[8] Rules, No. 68, p. 507.

[9] Code, Sec. 9 (XI).

II. Elements of the Program of Studies Applicable to All Types of Public Schools

Certain provisions of the school law apply to all types of public schools, both elementary and secondary, so far as concerns the program of studies.

A. Studies and Activities Related to Citizenship, Patriotism, and Nationalism

1. Teaching of the Constitution of the United States.

   This is required in all public and private schools in the state, and is to consist of "regular courses of instruction." It is to begin not later than the opening of the seventh grade and is to continue through the high school grades and even in courses in higher state institutions to an extent to be determined by the Commissioner.[12] It is to be noted that while the course is required, no provision is made by which it shall be prescribed or prepared by any particular agency.

2. Teaching of civics.

   The teaching of civics is required by two provisions of the law. In the act which established the course in physical training, it is required that there be given

   > * * * instruction as to the privileges and responsibilities of citizenship, as they relate to community and national welfare, with special reference to developing bodily strength and vigor, and producing the highest type of patriotic citizenship.[13]

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[10] Code, Sec. 50.

[11] Code, Sec. 165.

[12] Code, Sec. 332.

[13] Code, Sec. 407.

This requirement was made in 1917, following the entrance of the United States into the World War.

The second provision placing civics in the program of studies as a required subject is found in an act of 1927, by which

> * * * the Commissioner of Education shall prescribe a course of study in community civics, which course shall be given in such intermediate school or elementary school grades therewith as shall be approved by him.[14]

3. The observance of patriotic holidays.

   The law requires that there be held "appropriate exercises for the development of a higher spirit of patriotism" in all public schools on the last school day preceding Lincoln's Birthday, Washington's Birthday, Memorial Day, Thanksgiving Day, "and on such other patriotic holidays as shall be established by law."[15] It also makes it the duty of principals and teachers to make suitable arrangements for the celebration by appropriate exercises among the pupils of June 14 annually as the day on which the American Flag was adopted by the Continental Congress.[16]

4. The display of the flag and the flag salute.

   The law also requires each board to procure a United States flag and a flagstaff and to display the flag upon or near each public school building during school hours.[17] No provision has been found requiring its display in the classroom. The county superintendent is directed, however, by the rules and regulations of the State Board to "recommend" that in each school the daily exercises shall include a salute to the flag, the observance of which would almost necessitate the provision of flags in the classroom. This officer is also charged with the duty of reporting annually to the Commissioner of Education upon the display of the flag, the observance of Flag Day, and the observance of the flag salute in the schools under his supervision, and to direct the attention of school boards to the necessity of observing the law in these respects.[18]

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[14] Code, Sec. 418.

[15] Code, Sec. 348.

[16] Code, Sec. 349.

[17] Code, Sec. 337.

[18] Rules, No. 71, pp. 507–508.

B. Physical Training

As a response to the demand for a greater emphasis upon physical training when America entered the World War, the New Jersey legislature in 1917 made mandatory the establishment in the public schools of the state a course in that subject. The course as prescribed by law included activities not usually comprehended within the scope of physical training. The provisions of the law are that in addition to the usual physical education program, the course shall include civic training, instruction in domestic hygiene and first aid for girls, and, when required by the State Board of Education or by a local board, after approval of the voters, may include military training for boys in high school. The course is required to be taken by every pupil in every grade of the public schools, except kindergarten pupils and those physically unfit. It is to be required also of all students in the State Normal Schools. The time to be allotted to this activity in the program of studies is two and one-half hours each school week. The administration of the course is subject to the general supervision of the Commissioner of Education through such assistants as he may appoint with the approval of the State Board.[19]

C. Narcotics and Alcohol Instruction

It is required by law that "the nature of alcoholic drinks and narcotics and their effects upon the human system" be taught in all schools participating in public moneys. This material must be taught by the use of graded textbooks in the hands of pupils, either by including it in the textbooks on physiology and hygiene or by separate textbooks.[20] The law does not specify any particular grades in which it shall be presented.

D. Instruction in Fire Prevention

It is made incumbent on all boards or committees controlling local public schools or private or parochial schools to make arrangements for a course of instruction in fire prevention and to compel its use in such schools. The preparation of such a course of instruction is made the duty jointly of the Commissioner of Banking and Insurance and of the Commissioner of Education. Each teacher is required to devote not less than one hour monthly to this course.[21]

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[19] Code, Secs. 407–417.

[20] Code, Sec. 342.

Each principal and teacher is also required to have at least two fire-drills per month, when the school has two or more rooms, and to use the fire escapes, if any, during such drills.[22]

E. Instruction in Accident Prevention

By a 1931 act of legislature, the Commissioner of Education is required to prepare and publish from time to time handbooks on accident prevention properly graded, and to prepare suggested material which will correlate this instruction with other subjects. Boards of Education are required to provide for this instruction in their schools.[23]

F. Religious Observance and Instruction

The School Law provides that

> * * * no religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools.[24]

The law further specifies the extent of religious observance required and permitted. It requires that

> * * * in each public school classroom in the state, and in the presence of the scholars therein assembled, at least five verses [from the Old Testament shall be read or caused to be read] without comment, at the opening of such school, upon each and every school day, by the teacher in charge thereof.[24]

In case of a general assemblage of school classes at the beginning of the school day, the reading of the Scripture may take place in the manner indicated in the assembly instead of in the separate classrooms.[25]

The right of a board of education to permit pupils in the public schools to be excused during a part of the school session in order to receive religious instruction in churches or elsewhere, was tested in the case of Randolph v. Morristown Board of Education, and was in the first instance denied by the Commissioner of Education. On appeal to the State Board, however, that body, without adopting any opinion from among those presented by various members of the State Board, contented itself with reversing the decision of the Commissioner, and thereby made it possible for any local board to excuse pupils from public schools for religious instruction.[26]

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[21] Code, Secs. 616–618.

[22] Code, Secs. 421–422.

[23] P. L. 1931, Chap. 50.

[24] Code, Sec. 176.

[25] Code, Sec. 177.

G. Manual Training

As early as 1903, the New Jersey School Law encouraged the introduction of "manual training" or industrial education into the program of studies of its schools by grants of special state aid. This was conditioned upon the local district raising by special tax or by subscription $250 or more to establish such a course or school. The limit placed upon the state aid was $5,000 per year, the state matching up to that limit any sum spent in an approved manner by the local board. The State Board of Education is given the power to adopt rules governing the "management, control and approval" of such courses. If a separate school for such courses is founded in any school district through private subscriptions, the board of education may select from among the donors not more than six persons to assist in the management of the school.[27]

Under the provisions just stated, the State Board of Education has issued Rules and Regulations to govern the management of such courses as receive this special state aid, the use of the funds applied to their support, the equipment, the selection and assignment of teachers, and the disposition of any products from such courses. These Rules furthermore make the state funds applicable for approved expenditures only for manual training instruction in the fifth grade or above.

It is to be noted that the term "manual training" or "industrial education" is not limited in its application to industrial arts courses for boys, but includes also home economics courses for girls. Both types of work as here used, however, are non-vocational in content and organization.[28]

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[26] Randolph v. Morristown Board of Education, decision of St. Bd., Minutes of State Board of Education, Dec. 6, 1924, p. 1969, reversing decision of Com. of Ed., Mar. 4, 1924, State School Report, 1925, p. 275.

[27] Code, Secs. 316–320.

H. School Savings

The only excuse for including "school savings" in the list of curricular offerings of the public schools is the statement in the law that such practice is authorized "in order to encourage the habit of saving among the children in schools in the State of New Jersey."[29] It has therefore been made consciously a means of education in thrift. This law authorizes the principal or superintendent to make the necessary arrangements with any bank or trust company to handle such funds.

I. Arbor Day

In addition to the celebration of the national holidays, the law requires that

> * * * the day in each year known as Arbor Day shall be suitably observed in the public schools.[30]

The second Friday of April is designated for this purpose, and on that day "appropriate exercises shall be introduced in all the schools of the state." The Commissioner of Education is charged with the responsibility of preparing suitable circulars for such observance and issuing them to the schools. County and city superintendents are responsible for seeing to it that programs of exercises are prepared in all the schools under their jurisdiction.

III. THE ELEMENTARY SCHOOL PROGRAM OF STUDIES

No where in the School Law is the program of studies of the elementary school, either in minimum or in more extended form, prescribed. It is necessary to infer from certain provisions just what is intended to be included. Beyond the subjects and activities named in section I of this chapter, the provisions for the elementary program are found as described herewith.

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[28] Letter, C. D. Anderson, Statistician, Dept. of Public Instruction, Jan. 9, 1932.

[29] Code, Sec. 635.

[30] Code, Secs. 344–346.

A. The Examinations Given by the Commissioner of Education

The Commissioner is required to prescribe during each school term "an examination in at least arithmetic, writing, spelling, English, history and geography."[31] Prior to 1931, this examination was required to be given to the highest grade in each elementary school within sixty days of the expiration of the school term. The confusion which was caused in the elementary schools of districts which had intermediate schools, and whose highest elementary grade was presumably the sixth, and in districts having promotions semi-annually or oftener, was pointed out by the unpublished report of the New Jersey School Survey Commission experts.[32] In 1931 a supplement to the original law provided that "requirements for examinations at specific times and in specific grades shall not hereafter be effective."[33]

The effectiveness of the law in naming these subjects of study is largely destroyed by the provision

> * * * that if in any school any of said subjects is not taught * * *, the examination shall be confined to such of said subjects as are taught or used.[31]

Its importance is reduced also by the statement that

> * * * nothing herein contained shall impair the right of each district to prescribe its own rules for promotion.[31]

B. The Geography, History and Civics of New Jersey

The Commissioner of Education is required to prescribe, with the approval of the State Board, a course in the geography, history, and civics of New Jersey for the elementary grades. This course is given in the grade for which it is prescribed, and must be pursued by all children in that grade.[34]

C. The Kindergarten

Strictly speaking, the kindergarten is not a part of the elementary school. Since it is so closely associated with the latter, however, mention is made of it in this section. It is open to question also whether its activities should be classified as a "course of study." In any case, it is sufficient to note that the board of education of any school district may establish a kindergarten school or a kindergarten department in any school under its control. Any child resident in the district between the ages of five and six years must be admitted, and the board is permitted at its discretion to admit children above the age of four years.[35]

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[31] Code, Sec. 9 (X).

[32] New Jersey State School Survey Report, Chapter II, "Elementary Education" (1929).

[33] P. L. 1931, Chap. 306.

[34] Code, Sec. 419.

IV. The High School Program of Studies

A definite need for standardization of terminology is apparent when the grades above the elementary school are discussed. The State Board Rules, for purposes of apportionment, give the following definition for high school:

> Those schools shall be classed as high schools which require for admission the successful completion of eight years of graded preacademic work or its equivalent.[36]

In the case of the intermediate school, or junior high school, two definitions are found. The following is given in the School Law, and is less a definition than a delimitation:

> Hereafter any school district in this State having a school enrollment of at least one hundred pupils in the seventh, eighth and ninth grades may, with the consent of the State Board of Education, establish and organize such grades into an intermediate school.[37]

The State Board of Education, in setting requirements for teacher certification, has given the following definition for an intermediate school:

> A junior high school, or an intermediate school, is a school in which are included the first two or three years immediately following a six-year elementary school.[38]

A secondary school is defined thus in the same certification rules:

> A secondary school is a school which includes any or all of the four years of high school work following the eight-year elementary school or the junior high school.[38]

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[35] Code, Sec. 216 and P. L. 1931, Chap. 273.

[36] Rules, No. 43, p. 502.

[37] Code, Sec. 331.

[38] "Rules Concerning Teachers Certificates." Prescribed by the State Board of Education of New Jersey. Fourteenth Edition, 1930, Trenton, p. 6.

The scope of the intermediate school organization as given by the State Board Certification Rules is evidently broader than that given in the School Law, since the former recognizes an organization either of grades seven and eight, or of grades seven, eight, and nine, while the latter seems to recognize only the three-year organization. It is also evident that the term ''secondary school'' is not used with the customary connotation, by which it denotes an organization above the six-year elementary school or the eight-year elementary school, up to and including either the twelfth grade, or even the first two years of college work.[39]

It has already been indicated in this chapter that the School Law gives the Commissioner of Education power to ''prescribe a minimum course of study * * * for the high schools, if in his opinion it is advisable to do so.''[40]

It is the view of the Department of Public Instruction that the Commissioner has availed himself of the power granted by this law, which in its entirety covers both elementary and high schools:

> We consider that the monographs furnished by the State Department of Education during the last fifteen years are construed to be the minimum course of study in the subjects for which they were prepared.[41]

A. Specific Courses of Study Recognized by Law

In addition to the subjects or observances prescribed or recognized by law for all schools, as enumerated in the earlier part of this chapter,[42] the law recognizes the following as belonging to the high school which presumably means the school organization above the eighth elementary grade:

1. The course in ''Problems in American Democracy.''

   This course is required to be prescribed by the Commissioner of Education and is to be given in such senior high school grades as are approved by him. It is to be required of all pupils enrolled in the grade where it is taught.[43]

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[39] Koos, L. V.: *The American Secondary School,* pp. 37–38. See footnote [2] *supra.*

[40] Code, Sec. 9 (XI). See also this chapter, p. 265.

[41] Letter, Assistant Commissioner C. J. Strahan, Dec. 29, 1931.

[42] See pp. 266–271.

[43] Code, Sec. 418.

2. Military training.

   It was indicated in an earlier portion of this chapter, that when the voters of a municipality approve, the board of education may establish a course in military training for the boys in the high school, to be included in the prescribed course in physical training. When so established, all boys in high school except those who are physically unfit or those whose parents have conscientious scruples against military training, are required by law to pursue the course.[44]

B. State Approval of High Schools

The School Law, by the following measure, places in the hands of the State Board of Education the approval or disapproval of high schools:

> The State Board of Education * * * shall withhold or withdraw its approval of any secondary school whenever in its opinion its academic work, location or enrollment and per capita cost of maintenance shall not warrant its establishment or continuance.[45]

Under this provision, the State Board has set up conditions for approval, of which the following refer to curricula:[46]

1. The curricula must cover four full years of school work above the eighth grade and must be approved by the State Board.
2. Diplomas may be granted only to pupils completing a four-year curriculum aggregating at least 76 academic counts, of which four shall be in physical training. (A count is equivalent to one prepared recitation period of at least 40 minutes per week for a school year of 38 weeks, unprepared recitations or work-periods to count one-half.)

To a high school having less than four years of school work, the State Board will grant recognition by registering it as a "Partial High School," upon certain conditions. Of these, the following refer to curricula:[47]

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[44] Code, Sec. 411. See also p. 268 this chapter.
[45] Code, Sec. 2 (III).
[46] Rules, No. 45, pp. 502–503.
[47] Rules, No. 46, pp. 503–504.

1. Maintenance of three years of high school work.
2. Each curriculum must provide 57 approved academic counts.

C. The High School Diploma

As was previously stated, a high school diploma may be granted to a student completing a four-year curriculum with at least 76 approved counts. Under certain conditions specified in State Board Rules, credit toward diplomas is granted for work done in approved summer high schools, and in approved evening high schools.[48]

A board of education is authorized to grant certificates to pupils who have not completed a full four-year curriculum, but such certificates are not to be granted as diplomas, and shall carry a statement of the credits earned.[49]

Unless a board of education specifically requires it in its rules and regulations, the graduating exercises are not a part of the program of studies of the high school, and participation in them cannot otherwise be made a condition of graduation and of receiving a diploma.[50]

V. VOCATIONAL EDUCATION

A. Terminology

The school law defines vocational education as "any education the controlling purpose of which is to fit for profitable employment."[51] In the New Jersey system, three types of vocational education are recognized, namely, industrial education, agricultural education, and household arts education. These are defined in the law as follows:

1. " 'Industrial education' shall mean that form of vocational education which fits for the trades, crafts and manufacturing pursuits, including the occupations for girls and women carried on in work shops."[51]
2. " 'Agricultural education' shall mean that form of vocational education which fits for the occupations connected

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[48] Rules, Nos. 49–59, pp. 504–505.

[49] Rules, No. 47, p. 504.

[50] Bartlett v. Board of Education of Township of West Orange, S. L. D., p. 273, decision of Com. of Ed., May 27, 1912.

[51] Code, Sec. 425.

with the tillage of the soil, the care of domestic animals, forestry and other wage-earning or productive work on the farm or in the garden or greenhouse.''[51]

3. '' 'Household arts education' shall mean that form of vocational education which fits for occupations connected with the household.''[51]

B. Types of Vocational Schools or Classes

The school law provides for conducting any one or more of these types of work in several kinds of schools or classes:

1. In industrial, agricultural, or household arts schools, organized either as a separate school, or as a department of a school in the district.[51]
2. Evening classes in industrial or agricultural schools, for employed persons above the age of sixteen, the subject matter of which must be related to the day employment.[51]
3. Evening classes in household arts schools, giving training in home-making to girls and women over seventeen years of age.[51]
4. Part-time or continuation classes for persons working part-time.[51]

Such schools or classes may be provided and maintained by school districts, or may be organized by boards of chosen freeholders of the counties as county vocational schools.[52] The Commissioner of Education is charged with the responsibility of investigating the need for vocational education in the various units or communities, and of reporting to the State Board thereon. The State Board is given the power of approval of any plans for organizing such schools and of making rules and regulations for their establishment. Under such rules and approval, the Commissioner is required to superintend the establishment and maintenance of vocational schools, and is to supervise and approve them for apportionment purposes. He is likewise to approve or disapprove their location, rules for management, and courses of study, subject to the advice and consent of the State Board of Education.[53]

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[52] Code, Secs. 428 and 432.

[53] Code, Secs. 426, 429 and 433.

Industrial schools in the cities, established through gifts or endowment, or, in second-class cities, through funds raised by bond issue, may receive state aid for the establishment of the school equal to that raised locally and up to the amount of $3,000 per year upon evidence that at least an equal amount has been raised locally for maintenance. Not over $30,000 may be appropriated in any year for this purpose by the legislature. Such schools, it should be noticed, are not necessarily organized and controlled by the school district, but are under the control of a board of trustees. When receiving state aid, the Governor and the chief executive officer of the city are members ex-officio, and eight other members are appointed by the Governor. Such schools are to be "for the training and education of pupils in industrial pursuits (including agriculture), so as to enable themselves to perfect themselves in the several branches of industry which require technical instruction."[54]

C. Industrial Training for Delinquents

1. "Special schools of instruction."

   The board of education of any school district may establish a special school of instruction for dependent and delinquent children under 16 years of age who are committed by the juvenile court. As such, it is a part of the public school system of the district.

   The purposes for which such schools are to be established indicate the nature of the program of studies and are "education for good citizenship and self-support." The law specifies particularly that there shall be "ample ground for farming and gardening and other means for industrial training."[55]

2. County parental schools.

   These schools, when established in any first-class county on the initiative of the judges of the Court of Common Pleas, and financed by the board of chosen freeholders, are to provide "courses in industrial training and agriculture" for juvenile delinquents under 18 years of age, when committed by the court.[56]

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[54] Code, Secs. 554A–565.
[55] Code, Secs. 493–505.
[56] Code, Secs. 566–575.

VI. ADULT EDUCATION

The board of education of any district is authorized to establish and maintain several types of schools and classes for young people and adults.

1. Evening schools.

   The school law authorized the maintenance of such schools for residents over 12 years of age, in which the program of studies is evidently determined by local needs, since neither the Commissioner nor the State Board is given control over it. The school must be maintained for not less than 64 evening sessions of at least two hours each during the year, and at least three evenings each week, if the district is to receive state apportionment.[57]

2. Schools or classes for foreign-born residents.

   "Foreign-born" classes or schools may be conducted in either the day or the evening, and are open to residents over 14 years of age. Such classes must be maintained for at least 100 hours each year, and at least three sessions of one to two hours each week. The program of studies must be approved by the Commissioner and the State Board if the district is to receive state aid.

   In these classes or schools instruction is to be given in the English language, in the form of government and the laws of New Jersey and of the United States and in Problems in American Democracy. The State Board is required to prescribe rules for the management of such schools, for their inspection, and for certification of teachers. These rules provide that such classes are to be maintained separately from other evening school classes, although they may be held in the same building.[58]

3. Free lectures.

   Boards of education in municipalities of 10,000 population or over, may provide for free evening lectures for working people. Such lectures are to be "on the natural sciences and kindred subjects" and are to be held at least monthly from October to March.[59]

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[57] Code, Sec. 219.

[58] Code, Secs. 221, 491–492. Also Rules, Nos. 41–42, pp. 500–501.

[59] Code, Secs. 603–605.

VII. SUMMARY

The terminology employed by the New Jersey laws and by the State Board Rules to indicate the organization of the instructional program and of the subject matter used is sufficiently confusing to make it desirable that there be a re-definition or a change in the terms used in order to conform with standard usage. A similar situation exists with respect to the terms used in referring to different types of secondary school organization.

From the provisions noted in this chapter, it seems evident that the function of the state with respect to the program of studies or the curriculum is two-fold: first, to prescribe minimum requirements, and second, to approve programs of study and courses of study when constructed by local school authorities. The whip hand is held by the state through its control of apportionments made for activities or types of work when approved.

CHAPTER X

THE LEGAL STATUS OF TEACHERS, SUPERVISORS AND PRINCIPALS

I. Inclusiveness of the Term "Teacher"

The term "teacher" is variously used in different portions of the School Law of New Jersey. In the act which created the Teachers' Pension and Annuity Fund[1] it was made to denote a large number of positions, including even city superintendents and the Commissioner of Education of the state. In the Tenure of Service Act[2] for teachers, however, "teachers, principals, supervising principals of the public schools in any school district of this state" are named as those who are to enjoy the benefits of that act. Since a great many of the provisions of the law as applied to public school teachers apply also to principals and to supervising principals, but not to persons of higher position, the term "teacher" will in general be used in this study to include these three positions, unless it is otherwise indicated.

II. Selection and Employment of Teachers and Principals

In both Article VI districts[3] and Article VII districts,[4] the school board is given power to appoint or employ teachers and principals. While city superintendents, supervising principals, or county superintendents may by courtesy or by rules of boards of education be consulted in regard to such appointments, there is nothing in school law conferring such rights on these persons. The appointment or election of a teacher or principal must be by a majority vote of the whole number of members of the board of education, and not merely by a majority vote of those present.[5]

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[1] P. L. 1921, Chap. 219, or Code, Sec. 538 (7).
[2] P. L. 1909, Chap. 243, or Code, Sec. 179.
[3] Code, Sec. 89.
[4] Code, Sec. 127, div. II; also Sec. 132.
[5] Code, Sec. 89, 132.

The election of teachers is not an act that can be done without due consideration or without proper notice to board members. One court decision states this principle as follows:

> The employment of teachers by school corporations is an act judicial in its character, and should be done at a meeting of the trustees of which all should have notice, and in which all have an opportunity to participate.[6]

It frequently happens that school boards adopt rules and regulations concerning the employment, transfer, promotion, and dismissal of teachers. However, the Commissioner of Education has held that if the appointment of any teacher is

> * * * made in the manner required by the School Law, namely, a majority of all the members of the board, and of persons admitted to possess statutory qualifications for the positions in question, it is in the Commissioner's opinion immaterial that [such teachers] may have lacked qualifications prescribed by rules of the board of education and that the violation of such rules in no way affected the validity of the appointments.[7]

When a school has more than one teacher, one of them must be designated or elected principal. This position is made mandatory by implication in Sections 169, 172 and 424 of the School Code, which prescribe certain duties to be performed by the principal of every school having more than one teacher. The election of principals is to be performed in the same manner as in the case of teachers, namely, by a majority of the full number of members of the board.[8]

In the case of supervising principals, authorization for such is found in Section 131 of the Code. This provides that in Article VII districts, the board of education may appoint a supervising principal under such rules and regulations as the State Board of Education may adopt. The local board is empowered to define his duties and fix his salary, but the necessity for such officer must first be approved in writing by the county superintendent and approved by the Commissioner of Education and the State Board of Education. To receive such approval a district must have twenty-five full-time teachers, except that in rural districts and districts having high schools, twenty full-time teachers is accepted as a minimum number.[9] If two or more districts so desire, they may jointly employ a supervising principal. In such case the State Board of Education is authorized, upon application from the local boards, to appoint him and apportion the expense of his salary among the districts.[10] "Unapproved" supervising principals or supervisors are also provided for in the law, under a plan by which the need is not certified by the county superintendent nor approved by the Commissioner of Education. For this type of supervising principal the local district receives a smaller apportionment from the state than for one who is regularly approved.[11]

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[6] Townsend v. School Trustees, 12 Vr. 312.

[7] Noonan and Arnot v. Board of Education of Paterson, S. L. D., p. 116, decision of Com. of Ed., Jan. 7, 1925, affirmed by St. Bd.

[8] Code, Secs. 89, 132.

III. QUALIFICATIONS FOR TEACHERS AND PRINCIPALS

The school law establishes rules for qualifications of teachers and principals in three important respects, namely, certification, American citizenship, and prohibition of religious test.

A. Certification of Teachers and Principals

The most generally applicable statement requiring certification of teachers is that which sets forth that

> * * * no teacher shall be entitled to any salary unless such teacher shall be the holder of an appropriate teacher's certificate.[12]

A somewhat similar general provision is that which affects a teacher's contract, which states that such a contract is no longer valid when the board shall be notified in writing by the city or county superintendent or otherwise,

> * * * that said teacher is not in full possession of a proper teacher's certificate in full force and effect, notwithstanding the term of engagement for which such contract shall have been made may not then have expired.[13]

In the case of city school districts the especial provision is made that

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[9] Rules, No. 74, A., p. 509.

[10] Code, Sec. 2, div. II.

[11] Code, Sec. 273 (c), 275. Also letter from Asst. Com. C. J. Strahan, Dec. 29, 1931.

[12] Code, Sec. 174.

[13] Code, Sec. 165.

> * * * no teacher shall be employed in any of the schools of such district unless he or she shall possess such certificate issued by a City Board of Examiners or a State or a county certificate.[14]

As concerns approved supervising principals, the school law requires that

> * * * he or she shall hold either a State or first-grade county certificate.[15]

The rules of the State Board of Education are somewhat more extensive when they specify that

> * * * supervising principals shall hold a limited or permanent supervisor's certificate, or a State or first-grade county certificate.[16]

Teachers in elementary, secondary, and special schools receive state certificates to teach on the basis of courses pursued in New Jersey State Normal Schools,[17] Teacher Colleges,[17] or in approved summer schools or extension courses.[18] Under a rule of the State Board of Education, the State Board of Examiners discontinued giving examinations for teachers' certificates in April, 1927.[19]

The State Board of Education has passed a body of rules governing the issuance of the various types of teachers' certificates, which rules are contained in a special bulletin published by the Department of Public Instruction.[20] It is not within the scope of this study to outline these rules in detail.

A special prerequisite established in the law for certification of all public school teachers except teachers of music, drawing, manual training, or other special subjects, is that they pass a satisfactory examination in physiology and hygiene with special reference to the nature of alcoholic drinks and narcotics.[21] Since examinations for teachers' certificates are no longer given,[19] credits must be earned in these subjects.

By the provisions of the Code, the State Board of Education has power to make and enforce rules and regulations for examination of teachers and the granting of certificates or licenses to teach. This body therefore represents the seat of control in this matter. Under its rules and regulations, certificates are granted by the State Board of Examiners, a body consisting of the Commissioner of Education, one Assistant Commissioner, the principals of the State Normal Schools, all ex-officio, and a county superintendent of schools and a city superintendent, each appointed by the State Board of Education for one-year terms. To this body is also given the power to revoke certificates, under the rules of the State Board of Education.[22] The power to suspend certificates is given to the Commissioner of Education, for causes which will be noted in a later section.

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[14] Code, Sec. 44.

[15] Code, Sec. 131.

[16] Rules, No. 74 (b), p. 509.

[17] Rules, Nos. 11–15, p. 496.

[18] Rules, Nos. 29–35, p. 499.

[19] Minutes of State Board of Education, Feb. 9, 1924, p. 1764.

[20] Rules Concerning Teachers Certificates, prescribed by the State Board of Education of New Jersey, Fourteenth Edition, 1930, Trenton.

[21] Code, Sec. 343.

In addition to state certificates, provision has been made in the law for local certificates issued by County[23] or City[24] Boards of Examiners, if such should be established locally. In the former, the members are appointed by the county superintendent for one-year terms, and in the latter by the city board of education for a term not specified in the law. Furthermore, if any city school district maintains a normal school or training school for teachers whose courses are approved by the State Board of Education, the diplomas or certificates issued to graduates of such institutions may be accepted in that city as valid certificates for teaching.[25]

A rather singular exception to these provisions for issuance of certificates by State, County, or City Boards of Examiners, is one which requires that instructors in Military Training for high school boys shall hold a certificate as such to be issued by the Adjutant-General of the state.[26]

The teacher herself is the one held responsible for certification. In the case of McAuley v. Board, the State Board ruled:

> It was her affair, her business to see to it that she had a certificate. Not having it she was not under the tenure of service act, and the Board of Education was not only justified in dismissing her in January 1914, but should not have employed her or paid her after the expiration of her second grade county teacher's certificate in June 1913. From that time on she was not entitled to teach in the public schools of New Jersey.[27]

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[22] Code, Sec. 42.

[23] Code, Sec. 43.

[24] Code, Sec. 44.

[25] Code, Sec. 44.

[26] Code, Sec. 413.

[27] McAuley v. Board of Education of Prospect Park, S. L. D., p. 210, decision of St. Bd., May 6, 1916, reversing decision of Com. of Ed., Dec. 2, 1915.

B. Qualification of American Citizenship

The second major qualification for public school teachers in New Jersey is that of American citizenship. The law requires that every permanent teacher employed in the public schools of the state after the passage of the act in 1928, employed for a period of nine months in the year, shall be a citizen of the United States.[28] Furthermore, any such teachers holding positions at the time of the passage of the act and not citizens were required to become citizens or be subject to dismissal. Teachers of foreign languages were excepted from the provisions of this act unless they had been residents of the United States for ten or more years.

C. No Religious Test to Be Required

New Jersey law makes the provision, and establishes penalties, prohibiting the requirement of any religious test for candidates for teaching or any other position in any school supported wholly or in part out of state funds.[29] Furthermore, it prohibits any inquiry being made by anyone in any way connected with the school system of the state, concerning the religion of anyone proposed for or seeking employment in any capacity in the public school system of the state or in any school conducted wholly or partly with state funds.

IV. CONTRACTUAL STATUS OF THE TEACHER

There are in general two methods by which the terms of agreement between a teacher and the board of education may be set forth, although these two methods are not necessarily mutually exclusive. By the first method, the board may state the conditions of employment in its rules and regulations,[30] which would thereby cover all members of the teaching staff indicated. The board is authorized to set forth in these rules and regulations the conditions for A, engaging and employing teachers and principals; B, the terms and tenure of the employment; C, the rules for promotion; D, the rules for dismissal; E, the salaries, and the time and mode of payment thereof; and F, the rights and duties of teachers and principals under employment. The board is furthermore authorized to change, amend, or repeal such rules and regulations from time to time.

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[28] Code, Sec. 175.

[29] Code, Secs. 639–641.

[30] Code, Sec. 165.

By the second method of employment, if the board has not adopted rules and regulations as described, no contract between the board and the teacher will be valid unless it is in writing. This stipulation of the School Law is upheld specifically in the decision of the Commissioner in the case of Packard v. Kenilworth,[31] in which it was stated that if a local board has not adopted rules and regulations governing employment of teachers and principals, an oral agreement or contract between the board and a teacher is not valid. Even under a written contract, however, the teacher is subject to such rules and regulations as the board may make pertaining to duties, salary schedules, etc. Such a written contract, to be valid must meet a number of conditions. A, it must be in triplicate; B, must be signed by the president and district clerk or secretary of the board, and by the teacher; C, one copy must be filed with the board of education, one with the teacher, and one with the county or city superintendent; it must state D, the date when the teacher shall begin teaching; E, the kind and grade of certificate held by the teacher, and the date when the certificate will expire; F, the salary, and G, "such other matter as may be necessary to a full and complete understanding of the same."[30]

In order to ensure proper legal forms for such contracts, it is provided by law that forms of contract shall be prepared by the Commissioner of Education for distribution to school districts.[32]

Even though the law requires that a written contract be signed both by the authorized representatives of the board and by the teacher, the courts have held contracts valid even when not so completed:

> When a contract signed by one party only is accepted by the other party, it becomes binding upon both, the same as if signed by both.[33]

On the other hand, a contract properly executed

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[31] Packard v. Board of Education of Kenilworth (In *MSS.*), decision of Com. of Ed., Nov. 16, 1921, affirmed by St. Bd., Feb. 4, 1922.

[32] Code, Sec. 165.

[33] Marshall v. Hann, 17 N. J. L. (2 Harr), 425.

> * * * between a board of education and a teacher shall cease and determine and be of no effect against said board whenever said board shall ascertain by notice in writing received from the county or city superintendent, or otherwise, that said teacher is not in possession of a proper teacher's certificate in full force and effect, notwithstanding the term or engagement for which such contract shall have been made may not then have expired.[34]

From this it is evident that the lack of certification or the expiration of a certificate will so operate even during the term of contract as to bring the contract to an end.

This provision of the law has been further interpreted by the Commissioner of Education in the case of Wilbur v. Board in an opinion which reads in part as follows:

> No contract made by a teacher with a board of education is valid unless such teacher is the holder of a teacher's certificate in full force and effect, and a board of education has the right to terminate a contract with a teacher when it ascertains that such teacher has not a teacher's certificate.[35]

A second condition under which the courts have ruled that an otherwise legal contract may be rejected by a board, is found in the case of the creation of a new school district out of another district in which the teacher is employed. This decision brought out two interesting points, first, that such a contract was not automatically transferred from the former school district to the new school district, and second, that such a contract is not "school property" with the title to which the new district became vested as in the case of school buildings. These points are brought out in the court's decision as follows:

> The board of education of a township employed a teacher to teach in a certain named school "under the control of said board of education," and he accepted the employment, and agreed to perform his duty thereunder, and to observe and enforce the rules prescribed for the government of the school by the board of education. Subsequently the portion of the township in which the school was situated became by law a separate school district. Held, that the new school district was not bound by the contract.[36]
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> School Law [P. L. 1903 (2d Sp. Sess.), p. 15], § 34, providing that in any new school district the board of education in its corporate capacity

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[34] Code, Sec. 165.

[35] Wilbur v. Board of Education of Borough of Little Ferry, State School Report, 1919, p. 211, decision of Com. of Ed., Mar. 28, 1919.

[36] Board of Education of Borough of Flemington v. State Board of Education, 81 N. J. L. 211.

> shall become vested with the title to all school property in the district, and if there be any indebtedness for the erection, purchase, or repair of such property, it shall be assumed by and become the obligation of the board of education of the new district, does not impose on the new district the obligation of a contract with a teacher.[36]

This latter opinion was affirmed on appeal to the Court of Errors and Appeals.[37]

The general rule as to the making of valid contracts between teachers and boards is the same as for other types of contracts. These principles are enunciated by the court in the case of Feist and Feist v. A. and A. Realty Company,[38] as follows:

> A contract to obligate a corporation must have been its act either by corporate action, that of an authorized agent, or by adoption and ratification. Ratification will be implied from acquiescence or the acceptance of the benefits of such contract. It is essential to implied ratification that it and the acceptance of benefits be with knowledge of the facts.

It seems evident, therefore, that if a teacher's contract is signed by the proper officers prior to action by the board, it may become valid upon proper acceptance and ratification by the board in a meeting; or, if the board fails to act, but with knowledge of the facts permits the teacher to teach and pays her salary, it becomes bound. This view is supported by the decision of the Commissioner of Education in the case of Kipsey v. Board of Education of Warren Township, which stated:

> A Board of Education is presumed to know the law relating to contracts and the payment of salaries, and the Respondent having permitted Kipsey to serve as Supervising Principal, and having paid him his salary, it cannot at this late date plead that there was no contract with Kipsey.[39]

On the other hand, if an officer of the board, such as the district clerk or the Superintendent of Schools, should draw up a contract with a teacher when not authorized by action of the board to do so, it would not be valid, and the school district would not be bound, unless it ratified the contract as indicated above:

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[37] Glazer v. Flemington, 85 N. J. L. 384.

[38] Feist and Feist v. A. & A. Realty Co., 145 A. 478.

[39] Kipsey v. Board of Education of Warren Township, S. L. D., p. 138, decision of Com. of Ed., Dec. 29, 1911.

> A municipal corporation is not bound by a contract made in its name by one of its officers, though within the scope of its corporate powers, if the officer had no authority to enter into such contract on behalf of the corporation.[40]

If a teacher has a written offer of a position and has accepted it, this may not constitute a valid contract, unless properly ratified by the board:

> The offer and acceptance of a position as a teacher by correspondence where the board has not adopted rules for such employment may be considered as acts of intention from which either side may withdraw until bound by a legal contract.[41]

A. Limitation on Contracting Power of Board, and Ratification of Contracts

The courts have held that New Jersey boards of education are non-continuous bodies, that is, each board exists only for a definite term of one year, from the date of organization. Moreover, they have decided that this definite term fixes limits upon the contracting power of a board with the teacher:

> A board of education cannot enter into a contract with a teacher for any term when said term is to begin after the board has ceased to exist.[42]

The reason for this ruling of the courts is made clear by the decision of the Commissioner of Education in a case[43] appealed to the State Board and to the Supreme Court, both of which affirmed the finding of the Commissioner. This decision stated, in substance, that boards of education cannot by appointments for terms of years beyond their own official life bind succeeding boards, and by such appointment deprive the succeeding board of the right to fill an office which would logically have become vacant during its term. It follows, therefore, as was noted in the same case, that a contract given to a teacher by a board for a three-year term is voidable by the incoming board of education. Such a contract would, however, be capable of ratification and acceptance by each subsequent incoming board, as previously stated. Such ratification could be either by formal action of the board, or could be implied by acquiescence or acceptance of benefits of the services of the teacher, with knowledge of the facts in the case.

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[40] Giardini v. Dover, 101 N. J. L. 444.

[41] La Rose v. Board of Education of Egg Harbor City (In *MSS.*), decision of Com. of Ed., Nov. 30, 1931.

[42] Fitch v. Smith, 28 Vr. 526.

[43] Brown v. Board of Education of Borough of Oakland, S. L. D., p. 277, decision of Com. of Ed., Sept. 13, 1920, affirmed by St. Bd., affirmed by Supreme Court, Nov. 3, 1921.

A similar decision was made by the Commissioner in the case of Davis v. Board, concerning ratification of a teacher's or principal's contract:

> It is also the opinion of the Commissioner, however, that an appointment such as that of Appellant, even though plainly voidable by a succeeding Board of Education, is nevertheless capable of subsequent ratification either express or implied, since it involved no collusion or fraud or elements which could render it void.[44]

Even though a contract with a teacher by a board for a term of years is voidable by a succeeding board, it does not necessarily follow that an action changing the terms of a teacher's contract during the school year by increasing her salary can be voided by the board which comes into office after April 1:

> The action of the old board of education in authorizing the increase in salary of appellants to begin March 1, 1922, which according to the previous rulings of the department was entirely legal and actuated by a legal motive, constituted in the opinion of the Commissioner a new and binding contract between the appellants and the Glen Gardner Board of Education, which the new board * * * had no right to rescind.[45]

B. Absence of Written Contract

In another case, a teacher was performing the duties of a principal, had been elected as such by the board, rendered reports required of a principal, and was accepted as such by the county superintendent. The board seemingly accepted her services as principal but gave her no written contract as such. The board attempted to transfer her to a teaching position, and the teacher refused to accept such transfer, since she was under tenure. The Commissioner, in rendering a decision on the case, ruled as follows:

> A teacher having rendered service which was accepted and paid for constitutes an admission of a contractual relation.[46]

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[44] Davis v. Board of Education of Town of Boonton, S. L. D., p. 141, decision of Com. of Ed., Dec. 24, 1925.

[45] Davis et al. v. Glen Gardner Board of Education (In *MSS.*), decision of Com. of Ed., Aug. 24, 1922.

[46] Morrison v. Board of Education of Delaware Township, Camden Co., S. L. D., p. 163, decision of Com. of Ed., Oct. 14, 1915.

In the same case, the Commissioner declared, concerning the failure of the board to give the teacher a written contract, that

> * * * this was because the Board of Education failed to perform its duty. To be sure, the Appellant could compel the granting of a contract.[46]

C. When Employment Under Contract Begins

In New Jersey, on account of tenure laws, it is important to know when the date of employment under a contract begins. In at least two cases before the Commissioner this has been a critical point. In the case of Tansey v. Board, the opinion was as follows:

> The period of employment must be deemed to begin not with the date of execution, but with the date named in the contract for the beginning of such term.[47]

A similar decision in the case of Dunham v. Board[48] makes clear that the date of the beginning of the contract is the date named for the beginning of the school term. In each of these cases, the Appellant attempted to prove that the teacher-contract year coincided with the school fiscal year, which is set by law as extending from July 1 of one year to June 30 of the next year.

These rulings are moreover supported by the decision of the court in the case of Carroll v. State Board:

> Teacher's period of employment under contract bearing date before it became operative by its terms did not commence until operative date.
>
> Teachers' contracts were not, in determining whether three consecutive years had been completed to be construed in connection with statute fixing school year (4 Comp. Stat. 1910, p. 4763, § 106 A; p. 4804, § 238; p. 4973, § 10).
>
> [The above statute] provides that school year shall begin on the 1st day of July and end on the 30th day of June, and has been construed to be for fiscal and administration purposes.[49]

D. Termination of Contract with Teacher Not Under Tenure

In the same case, the question was raised concerning the rights of a teacher under a term contract, whose contract was terminated before three years of service was completed. The teacher claimed that he was entitled to a hearing after charges were preferred. The court ruled that

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[47] Tansey v. Board of Education of Township of Matawan (In *MSS.*), decision of Com. of Ed., Dec. 10, 1929.

[48] Dunham v. Board of Education of Township of Matawan (In *MSS.*), decision of Com. of Ed., Dec. 10, 1929.

[49] Carroll v. State Board of Education, 152 A. 339.

> Teacher whose contract was terminated before three years' service was without benefit of statute relating to service during good behavior and efficiency. (4 Comp. St. 1910, p. 4763, § 106a).[49]

This decision makes it clear that for any such teacher a board can terminate the contract at the end of the contract period without assigning causes and without preferring charges or giving a hearing.

E. Assignment, Transfer, Demotion, and Promotion of Teachers Not Under Tenure

Just as a contract with a teacher may be terminated at the end of a contract period in the case of a teacher not under tenure, without showing cause, so the board of education subject to such rules and regulations as it may have made, has full authority to transfer, demote, or promote a teacher at the end of a contract period, without violation of law.[50]

F. Dismissal of Teacher Not Under Tenure

When a teacher is not under tenure, he may be dismissed much more easily than if under tenure. The school law provides[50] that the board may make rules and regulations concerning dismissal. Under the same provision of the law, conditions for dismissal may be placed in the teacher's contract; since the provision includes "such other matter as may be necessary to a full and complete understanding of the same." Such contracts usually contain a notice-clause, providing for either party giving thirty or sixty days or other period of notice to the second party, when it is desired to end the contract. Unless rules and regulations of the board of education, or the contract itself require it, however, it is not necessary to state any cause for terminating the contract in this manner. In the case of Mannion v. Board, the Commissioner held:

> While in some States outside of New Jersey the courts have held that teachers' contracts cannot be terminated without just cause even though

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[50] Code, Sec. 165.

> the contracts contained provision for their termination at the option of the parties, it is held in an equal number of other States that such bilateral provision for termination is entirely legal.
>
> In view, therefore, of the fact that the matter has never been judicially determined in New Jersey and that legal opinion in other States seems fairly divided on the subject, and in view of the fact that it is a well recognized principle of law that agreements may contain provision making them determinable at the option of either of the parties, a principle which this Department has frequently upheld and sanctioned in matters involving teachers' contracts, it is the opinion of the Commissioner of Education that the Board of Education of Northampton Township committed no illegal act in exercising the privilege given it by contract of dismissing the said Mary B. Mannion from its service.[51]

In this case the board had served the notice upon the teacher before she had as yet rendered any service.

A board of education may, in the case of a teacher not under tenure, dismiss a teacher at any time, without giving notice even if required to do so by its own rules and regulations or by the terms of the contract itself. In such case, however, it is responsible for the consequences of the act. The board may choose to prefer charges, and give a hearing, or may act summarily. In either case, the teacher has the right to appeal to the Commissioner and the other established tribunal in the manner provided by law. If charges have been made and are sustained, the board is relieved of responsibility; if, however, the causes are found on appeal not to have been sufficient, the board has the choice of permitting the teacher to finish her term or of paying her salary for that period. If the board has not attempted to show cause and does not defend the action, the same options are open to it. These points are brought out in the following quotations:

> 1. In case the dismissal of any teacher before the expiration of any contract entered into between such teacher and a board of education shall, upon appeal, be decided to have been without good cause, such teacher shall be entitled to compensation for the full term for which said contract shall have been made; but it shall be optional with the board of education whether such teacher shall or shall not teach for the unexpired term.[52]

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[51] Mannion v. Board of Education of Township of Northampton, Burlington Co., S. L. D., p. 84, decision of Com. of Ed., July 2, 1920.

[52] Code, Sec. 167.

> 2. Mr. Brisson was dismissed without making charges against him, and without giving him three months' notice as stipulated in the contract. The Board of Education had the right to relieve Mr. Brisson of his duties as a teacher, but it is responsible for the legal consequence of its act; that is, the Board must pay Mr. Brisson full salary for the year. This was done and the obligation of the Board of Education has been fully discharged.[53]

In the case of White v. Riverside Township,[54] the board had employed a teacher and placed her under contract without having previously interviewed her personally. When she presented herself for service, however, they discovered for the first time that she was of the colored race, and not of the white race, as her photograph had seemed to them to indicate. The board informed her that there was no class for colored children, and refused to permit her to teach, and paid her no salary. It was held by the State Board that the refusal to permit her to teach was equivalent to notice of dismissal, but that the Board was liable for her salary until the expiration of the notice period.

G. Causes for Dismissal of Teacher Not Under Tenure

Since the greater number of cases interpreting good causes for dismissal have occurred in instances where teachers were under tenure, a discussion of that point is deferred to that section of this chapter which refers to tenure of service.

H. Suspension of Teacher Not Under Tenure

''Suspension'' of a teacher would seem to mean an action by competent authorities by which a teacher is relieved of her duties for a temporary period, either as a punishment or pending further action by some higher competent authority. This power is definitely given and the manner of its use described for Article VI districts, but is only to be assumed for Article VII districts since the law permits a board of education of any district to ''make rules and regulations governing the engagement and employment of teachers and principals,'' and where written contracts are given, to include in them "such other matter as may be necessary to a full and complete understanding of the same."[50] For teachers under tenure, suspension from service is prohibited by a decision which will be quoted in the section relating to such teachers.[55]

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[53] Brisson v. Board of Education of Borough of Leonia, S. L. D., p. 83, decision of Com. of Ed., Sept. 22, 1917.

[54] White v. Board of Education of Riverside Township (In *MSS.*), decision of Commissioner of Ed., modified by St. Bd., Oct. 6, 1923.

In Article VI districts, according to law,

> * * * the superintendent of schools may, with the approval of the president of the board of education, suspend any assistant superintendent, principal or teacher, and shall forthwith report such suspension to the board of education, which board shall take such action for the restoration or removal of such assistant superintendent, principal or teacher as it shall deem proper; provided, that such action shall be by a majority vote of all the members of said board.[56]

I. Resignation of Teachers Not Under Tenure

Resignation of a teacher not under tenure is to be governed by the rules and regulations of the board of education or by the terms of the contract given such teacher by the board.[50] If the rules and regulations or the contract provide a notice clause, the serving of such notice by the teacher on the board places the termination of the contract at the expiration of the notice period. If no such notice clause is provided for, the teacher cannot leave before the expiration of the contract without the consent of the board of education, under penalty of being declared guilty of unprofessional conduct, and of having her certificate suspended for a period not to exceed one year by the Commissioner of Education, if the facts of the case are presented to him.[57] Such penalty is also applicable to a case where a teacher leaves her position without serving such notice as may be provided for, or before the expiration of the notice period, if such notice has been served, unless the board consents to her leaving.

Any resignation by a teacher, it should be noted, is not effective until accepted by the Board of Education, even when notice has been given,[58] and may be withdrawn prior to such acceptance.

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[55] Conway v. Board of Education of Borough of Edgewater, State School Report, 1928, p. 101, decision of Com. of Ed., June 27, 1928.

[56] Code, Sec. 90.

[57] Code, Sec. 168.

Resignation must be affirmative and direct in character and cannot be inferred from other acts of the teacher:

> Counsel for respondent contends that a certain affidavit made by appellant in application for refund of premiums credited to her by the Trustees of the Teachers' Pension and Annuity Fund indicated that she resigned from the Atlantic City teaching staff in April, 1928.
>
> This contention of the respondent can be readily disposed of. A resignation is not complete until it has been offered to and accepted by the proper authorities. Whether such application indicated resignation need not be considered. Appellant did not tender her resignation to the Secretary of the Board of Education, which is the proper authority, and said board, therefore, could not have accepted it.[59]

V. THE TENURE OF TEACHERS

There are two acts under which teachers may in New Jersey secure tenure, or as it is commonly termed, "permanent tenure." One of these is the so-called "Tenure of Service Act," P. L. 1909, Chap. 243. The other is the "Veterans' Tenure Act," P. L. 1922, Chap. 229, which in 1922 included offices and positions under boards of education, but as amended in P. L. 1926, Chap. 287, excluded them, and in the latest amendment of P. L. 1929, Chap. 29, again brings them within the benefits of the law. These two acts and their operation will be discussed separately.

A. Teachers' Tenure of Service Act

The Tenure of Service Act is so fundamental in controlling the relations of teachers and school boards, and has resulted in such a large number of hearings and decisions by the established tribunals, that the more significant passages of it are here quoted:

> The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment

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[58] Straughen v. Board of Education of Township of Upper Penn's Neck, State School Report, 1918, p. 189, decision of Com. of Ed., July 2, 1918.

[59] Hershaw v. Board of Education of Atlantic City (In *MSS.*), decision of Com. of Ed., Aug. 3, 1931.

of three consecutive years in that district, unless a shorter time is fixed by the employing board; provided, that the time any teacher, principal, supervising principal has taught in the district in which he or she is employed at the time this act shall go into effect shall be counted in determining such period of employment. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said board of education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said school board or not.

* * * * *

Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; and provided further, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect.

Any teacher, principal or supervising principal, under tenure of service, desiring to relinquish his or her position, shall give the employing board of education sixty days' written notice of such intention, unless the local board of education approve of a release on shorter notice.

Any teacher failing to give such notice shall be deemed guilty of unprofessional conduct, and the Commissioner of Education is authorized to suspend the certificate of such teacher for a period of not exceeding one year.[60]

The portion of the act not quoted concerns the power of the board to summon witnesses for a hearing against a teacher or principal, and to examine them under oath.

In order to make the provisions of the act, and its interpretation by the various tribunals, more easily understood, an analysis is given of the law, together with decisions or opinions which apply.

1. Securing the benefits of the tenure of service act.
    - (a) Who may secure its benefits.
        - (1) Teachers, principals, and supervising principals, of school districts. Supervisors of special subjects or

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[60] Code, Secs. 179, 181, 182 (P. L. 1909, Chap. 243).

of schools in school districts would be included as classified under one of the three classes named.

The status of substitute teachers under the tenure act depends upon the circumstances and conditions of their employment. This is made clear in the following decision:

> A regular substitute under full-time employment, who serves more than three consecutive years has tenure rights as long as the board continues the services of full-time substitutes. The evidence in this case shows that the Newark Board of Education does not employ general substitutes on annual salaries. Mrs. Waters was appointed during the three and one-half years preceding the termination of her services, for particular substitute work. When the regular teachers for whom she was appointed to substitute returned, the substitute positions for the respective terms were automatically abolished and her services as special substitute thereby terminated. * * *
>
> It is the opinion of the Commissioner of Education that appellant did not, at the close of the school year, June 30, 1931, hold a valid certificate for a permanent position. [Appellant held a certificate issued by the city board of examiners which qualified the holder for daily substitute teaching only.] The broadest interpretation that can be given to the certificate held by the appellant is that it qualified for temporary substitute teaching, which is not classified as a permanent position and therefore the certificate was for a position not protected by the provisions of the Tenure of Office Act.[61]

(2) City Superintendents or Assistant Superintendents of Schools are specifically excluded from the benefit of the act. Such persons as county superintendents, helping teachers, principals or teachers of county vocational schools are excluded since they are not employees of school districts.

(b) When its benefits are secured by those qualified.

(1) After the expiration of a period of employment of three consecutive calendar years in the same school district, or,

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[61] Waters v. Board of Education of City of Newark (In *MSS.*), decision of Com. of Ed., Nov. 25, 1931.

- (2) After a shorter period than three consecutive years when so fixed by rules of the employing board.

(c) What constitutes "a period of employment of three consecutive years" in the same school district.

- (1) A teacher is not protected by Chapter 243, P. L. 1909, until he has begun the fourth year of consecutive service in the district.[62]
- (2) The fact that the full period of employment must be for less than three consecutive calendar years if the board desires to prevent the teacher from receiving tenure protection was also made clear by Justice Parker in the case of Davis v. Overpeck Township, in which he said:

  > If the board wished to avoid the Tenure of Office Act, it could have made the term of the 1911 contract [third year] less than a year, or it could have given thirty days' notice during the year, as provided in the contract, and thus cut off the employment short of three years. Not having done so, the Act of 1909 applies.[63]

  The decision in the case of Davis v. Overpeck Township was the basis for similar decisions in later years on the same point, notably Shapiro v. Paterson,[64] Goble v. Easthampton,[65] and White v. Hillsdale.[66]
- (3) The decision of Goble v. Easthampton, just referred to, described still more clearly the method of determining whether a teacher is entitled to tenure protection. This decision made it clear that the contract must extend the term of employment to include

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[62] Marsteller v. Board of Education of Pleasantville, State School Report, 1912, p. 104, decision of Com. of Ed., May 9, 1912. Reversed by St. Bd., Dec. 7, 1912.

[63] Davis v. Board of Education of the Township of Overpeck, S. L. D., p. 187, decision of Supreme Court, May 28, 1913, affirming decision of St. Bd., Mar. 1, 1913, reversing decision of Com. of Ed., Nov. 7, 1912.

[64] Shapiro v. Board of Education of City of Paterson, 3 N. J. Misc. Rep. 406, decision of Com. of Ed., Apr. 7, 1925.

[65] Goble v. Easthampton Township Board of Education, S. L. D., p. 86, decision of Com. of Ed., Sept. 16, 1926.

[66] White v. Board of Education of Borough of Hillsdale, S. L. D., p. 124, decision of Com. of Ed., Nov. 2, 1926.

> * * * three consecutive calendar years from the date of * * * first employment, or the teacher must have a valid contract for a fourth consecutive year.[65]

In the case cited, the first year's employment began September 4, 1923, and by the terms of the contract was for one year, or to September 4, 1924; the second year of service under the contract was from September 2, 1924, for one year, or to September 2, 1925. There was a dispute as to the date of beginning of the third year of the contract, namely, whether it was September 1 or September 7, 1925. If the date was September 1, the year of the contract would end September 1, 1926, and the teacher would have been under contract three days less than three years, from the beginning of her first contract on September 4, 1923. If the date of her third contract was September 7, she would on September 7, 1926, when she finished her third year of her service, have completed three days more than three years under contract. In the former case, she would not be entitled to tenure, but in the latter she would, since she would have completed the full three years according to the terms of her contract. The decision of the Commissioner, as it happened, based on the date of payment of the first month's salary for the third year, was that the contract for that year began September 1, and that the teacher was therefore not entitled to tenure. It was attempted in this case by counsel for Appellant to show that the teacher was under contract for a fourth consecutive year, and hence entitled to tenure, but it was shown that the election for the fourth year's term had been by less than a majority of the full number of members of the board, and was therefore invalid and the contract likewise invalid.

(4) The "employment" to be credited toward the three consecutive years required, must be legal employment. The case of Shapiro v. Paterson, previously referred to,[64] showed that a teacher who holds no valid written contract for her third consecutive calendar year of teaching, and who is not employed under rules and regulations of the board of education regulating such employment, cannot claim the protection of the tenure laws.

(5) A teacher who is at the beginning of her employment given a three-year contract, does not automatically cause any dispute concerning this contract to become a case under the tenure act, since no board whose term expires during the term of such contract can bind its successors, although the succeeding boards, either by formal action or implicitly, can accept the terms of such contract.[67]

(6) From what date is the three-year period of employment to be reckoned?

> In the Commissioner's opinion * * * the period of employment must be deemed to begin not with the date of execution [of the contract], but with the date named in the contract for the beginning of such term.[68]
>
> Teacher's period of employment under contract bearing date before it became operative by its terms did not commence until operative date. * * * Teachers' contracts were not, in determining whether three consecutive years had been completed, to be construed in connection with statute fixing school year. * * * The above statute provides that school year shall begin on the 1st day of July and end on the 30th day of June, and has been construed to be for fiscal and administrative purposes.[69]

(7) Effect on tenure rights of predating contract.

> We are of the opinion that a board of education cannot, by predating the commencement of a period of employment embodied in a contract with a teacher, confer the

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[67] Davis v. Board of Education of Town of Boonton, S. L. D., p. 141, decision of Com. of Ed., Dec. 24, 1925.

[68] Tansey v. Board of Education of Township of Matawan (In *MSS.*), decision of Com. of Ed., Dec. 10, 1929.

[69] Carroll v. State Board of Education, 152 A. 339.

> right of tenure upon such teacher. The statute requires three consecutive years of employment. If that period can be fixed by an arbitrary date, without reference to actual employment, then a board who desired to favor a teacher in securing tenure might make a contract with such teacher at any time during the year, and by predating the commencement of such employment, substantially reduce the required period of three years.[70]

(8) Three consecutive years must be in same district, but not necessarily in same position:

> The act does not, in the Commissioner's opinion, prescribe the necessary three-year period of service for each of the groups, namely, teachers, principals and supervising principals, but makes permanent the term of an incumbent whether he be teacher, principal or supervising principal, who has been employed for three consecutive years in the aggregate in the various designated positions or who has been promoted to the higher of such positions, after three years of service in any one of them.[71]

(9) In one case the question was raised whether a teacher could acquire tenure by service rendered after the expiration of her contract. The State Board ruled that a teacher who attempts to render service after her contract has expired is not protected by said act unless she has been reappointed by the board of education.[72]

(d) When a shorter term than three years entitles a teacher to tenure rights.

(1) General principle,—fixing a shorter term must be the result of definite board action with the intent to make such provision, and cannot be inferred from other action.

> Such action should be of an affirmative character by the board in meeting assembled and not left to inference.[70]

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[70] Weekley v. Board of Education of Teaneck Township (In *MSS.*), decision of St. Bd., Dec. 7, 1929, affirming decision of Com. of Ed., Aug. 26, 1929. See also Gamnon v. Elizabeth Board of Education, State School Report, 1924, p. 251.

[71] MacNeal v. Board of Education of Ocean City, S. L. D., p. 152, decision of Com. of Ed., Sept. 27, 1926, affirmed by St. Bd., Jan. 8, 1927, affirmed by Supreme Court, Jan. 18, 1928.

[72] Marsteller v. Board of Education of Pleasantville. See footnote 62 *supra.*

(2) If an employing board predates a contract, such action is held not to "fix a shorter period" of employment than the three years required, and hence does not entitle the teacher to tenure rights under that period of time.[73]

(3) "Permanent appointment" as distinguished from "temporary appointment" under rules of board held not to be construed as fixing a shorter term of employment.[74]

2. The benefits conferred by the Tenure of Service Act.

The benefits conferred may be reduced to one fact, namely, permanent tenure of position, except for conditions provided for dismissal. Permanent tenure includes security in the position held, security against demotion, and security against reduction in salary.

(a) Extent to which the teacher under tenure has security in the position. Security extends to all cases except—

(1) Transfer to equivalent position at no reduction in salary.

A transfer is not a demotion or dismissal.[75]

(I) In this case a principal teacher of seventh and eighth grades school was transferred to a position as principal of fifth and sixth grades school at no reduction of salary, and the Supreme Court held it valid.

(II) A teacher who is teaching a single subject in elementary grades, e. g., drawing, may be transferred legally to a position where she will teach all subjects in a single elementary grade, by a majority vote of the whole number of the board, and such transfer does not constitute a demotion, if there is no decrease in salary.[76]

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[73] Allen v. Bellefield Board of Education (In *MSS.*), decision of Com. of Ed., Aug., 1928, affirmed by St. Bd., Dec. 8, 1928.

[74] Ackerman v. Board of Education of City of Phillipsburg, State School Report, 1926, p. 78, decision of Com. of Ed., Dec. 14, 1925, affirmed by St. Bd., Apr. 3, 1926.

[75] Cheesman v. Board of Education of Gloucester City, S. L. D., p. 156, decision of Supreme Court, affirming decision of St. Bd., and reversing decision of Com. of Ed., Oct. 28, 1921.

(III) But the transfer must be by a majority vote of the whole number of members of the board of education.[77]

(2) Lack of valid certification.

> A teacher not having a certificate is not under the tenure of service act, even though she has qualified in all other respects.[78]

(3) Where the position is legally abolished.

A position may be abolished either because of "natural diminution of the number of pupils in said school district,"[79] or for purposes of economy.

A statement of the principle involved in these two causes, which are supplementary, is found in the following quotations:

> The statute must be so construed that it will permit a Board of Education to close a school or abolish a class which is unnecessary, even though such action results in the dismissal of a teacher who is protected by the Tenure of Service Act. This construction is in accord with the decisions of the Supreme Court in the cases of Paddock v. Hudson County Board of Taxation, 82 N. J. L. 360, and John Colgarry vs. Board of Street and Water Commissioners of the City of Newark, 89 Atlantic Reporter 789.[80]
>
> It is quite apparent from the many decisions and authorities on the subject that whenever bona fide reasons exist, such as economy in the public interest, for the abolition of an office and the transfer of its duties to another official, such office may be abolished even though the incumbent be protected by a Tenure of Service Statute.[81]
>
> When a board of education due to diminution in number of pupils or for other good reason abolishes a position,

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[76] Shroder v. Board of Education of Irvington, State School Report, 1919, p. 216, decision of Com. of Ed., July 25, 1919.

[77] Code, Secs. 89, 132.

[78] McAuley v. Board of Education of Prospect Park. See footnote 27 *supra.*

[79] Code, Sec. 181.

[80] Tobey v. Board of Education of City of Newark, S. L. D., p. 161, decision of Com. of Ed., Aug. 17, 1914.

[81] Gordon v. Jefferson Township Board of Education, S. L. D., p. 169, decision of Com. of Ed., July, 1923, affirmed by St. Bd.

> it may legally dismiss the teacher who held such position without violating the Teachers' Tenure Act, and if it appointed such teacher to a new position at a lower salary than previously held, such appointment is not a transfer but a new appointment and the lower salary is legal if in accordance with rules of the local board.[80]

There were at least two instances, however, where it was necessary for the Commissioner to decide whether the positions had actually been abolished. In the case of Mills v. Washington Township, the incumbent had been principal of schools of the township, which had a two-year high school in addition to the usual elementary school. In order to improve the educational facilities of the district, however, the board decided to close the high school and to transport all high school pupils to another district. The board dismissed the principal, some of whose duties as such had been connected with the elementary school, and the principal appealed to the Commissioner on the ground that he was under tenure. The defense of the board was that the position of principal had been abolished, but the Appellant claimed that the position of principal so far as it concerned the elementary grades still remained, and that he was entitled to it at no reduction in salary. The Commissioner's decision said in part:

> It is the Commissioner's opinion that a position may be considered as abolished when so many elements are removed therefrom that there no longer substantially exists the office or position to which the incumbent was appointed and for which his services were originally desired. In the case under consideration, even if the principalship occupied by the appellant did involve some work in connection with the elementary grades, it appears from the testimony that the major portion of appellant's duties comprised high school supervision and the teaching of high school subjects.[82]

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[82] Mills v. Board of Education of Washington Township, Morris Co. (In *MSS.*), decision of Com. of Ed., Dec. 5, 1929.

On the basis of these facts, the discharge of the principal by the board was upheld.

The second case, that of Tomlin v. Glassboro,[83] hinged upon the legality of the vote taken by the board. In this case the board which consisted of nine members, five being present, voted by a majority of four to one to abolish the printing course taught by the teacher, and thus abolish the position. The Commissioner decided that the course of study had not been legally abolished, since such action required by law the approval of a majority of all the members of the board, and not of a mere quorum. It was ruled that since this was the situation, the teacher could be removed only after charges and a hearing, since he was under tenure.

(4) In case of resignation.

If a teacher or principal resigns from a position in a school district, and is later reappointed, even if immediately, he cannot count the earlier period of service in claiming tenure rights. The following opinion illustrates this fact:

> [If a Supervising Principal who is under the provisions of the Tenure of Service Act resigns and is reappointed, even if immediately, to the same position], the effect of the resignation [is] to cut him off from the benefit of the Tenure of Service Act.[84]

If, however, the board had demanded a teacher's resignation, the case is somewhat altered:

> A request for a resignation to take effect immediately is in its essence equivalent to a dismissal of a teacher and, hence, requires a majority vote of the Board to make it legal. In such cases an entry on the records of the meeting of the names of the persons voting has been held essential.[85]

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[83] Tomlin v. Glassboro Board of Education (In *MSS.*), decision of Com. of Ed., Jan. 20, 1923.

[84] Fountain v. Board of Education of Madison Township, S. L. D., p. 179, decision of St. Bd., Dec. 1, 1917, affirming decision of Com. of Ed., Mar. 21, 1917.

[85] Straughen v. Board of Education of Township of Upper Penn's Neck. See footnote 58 *supra.*

Likewise, in such case the teacher is entitled to a hearing, as in case of dismissal. This case also repeats the commonly accepted rule that "a resignation by a teacher is not effective until accepted by the Board of Education."

(5) The protection in the position held extends even to prevent suspension from position or duties. The case of Conway v. Edgewater seems to supply the only decision on this point:

> Since the statutes confer upon a board of education the power to suspend teachers under contract and janitors and make no provision for suspension under the Teachers' Tenure of Service Statute, the action of [a] board in suspending its Supervising Principal who is under tenure is in the opinion of the Commissioner inconsistent with the act and is therefore illegal.[86]

(6) The protection in the position held extends to a teacher or principal whose appointment under the rules of the board is invalid, if the teacher was otherwise appointed in the manner required by law, namely, by a majority vote of all the members of the board, and if the teacher otherwise possesses the statutory qualifications and is in other respects entitled to tenure protection.[87]

(b) What demotion is and to what extent a teacher under tenure is protected from it.

(1) Transfer to an equivalent position at no reduction in salary is not demotion. An example of an equivalent position would be one as principal of a school comprising grades five and six as compared with one as principal of a school comprising grades seven and eight.[88]

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[86] Conway v. Board of Education of Borough of Edgewater, State School Report, 1928, p. 101, decision of Com. of Ed., June 27, 1928.

[87] Noonan and Arnot v. Board of Education of Paterson, S. L. D., p. 116, decision of St. Bd., affirming decision of Com. of Ed., Jan. 7, 1925.

[88] Cheesman v. Board of Education of Gloucester City. See footnote 75 *supra.*

(2) Transfer from a position as principal-teacher to a position as teacher,[89] or from a position as principal to that of teacher constitutes demotion.

The opinion of the State Board in the case of Davis v. Overpeck gives the interpretation usually placed on this type of demotion:

> When a principal is reduced to the rank of a teacher, he is dismissed as a principal just as surely as is an officer in the Army dismissed as such when he is reduced to the ranks and another assigned to his place or as would a teacher be dismissed as such if made a truant officer or a janitor * * *[90]

This opinion also takes the view that to reduce a principal or teacher in rank to a lower position but at the original salary is contrary to the intent of the Tenure of Service Act, since this would result in paying the salary of a higher grade position to one in a lower position:

> If such procedure can be adopted, it would not only be unjust to the taxpayers, but it would promote dissatisfaction among teachers, for what teacher would not feel aggrieved if another teaching the same grade, with no more experience, was paid the salary not of a teacher but of a principal?[90]

(c) The protection given to a teacher under tenure against reduction in salary.

The usual or customary application of this form of protection is obvious. There are two instances of application of the principle, however, which are less obvious, and which have arisen out of cases growing out of the Tenure of Service Act.

The first of these is a decision which declared a change in method of paying teachers under tenure from ten monthly payments to twelve, to be in violation of the act. It is to be noted, however, that the decision does not operate to make illegal the twelve monthly payments as applied to teachers generally. A portion of the decision is as follows:

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[89] Morrison v. Board of Education of Delaware Township, Camden Co., S. L. D., p. 163, decision of Com. of Ed., Oct. 14, 1915.

[90] Davis v. Board of Education of Township of Overpeck. See footnote 63 *supra*. Also MacNeal v. Board of Education of Ocean City. See footnote 71 *supra*.

> The prosecutrix had served three consecutive years as school teacher in the public schools of Paterson and therefore, holds her employment during good behavior and efficiency and is not subject to a reduction of salary. A resolution by the board of education changing the mode of payments from ten equal monthly payments to twelve, and which in effect clearly reduces her salary, is in clear violation of the section.[91]

The second decision worthy of note refers to a case where a teacher had been given certain temporary increases in salary for special work, the teacher understanding that both the extra work and the extra pay were only temporary. Eventually the board relieved the teacher of the extra work and likewise withdrew the extra salary. The teacher appealed from the action of the board, and the State Board, in supporting the action of the board of education, gave it as its opinion that such withdrawal of temporary increases cannot be regarded as reduction in salary, since

> * * * if the statute were so construed any and all temporary payments to teachers for temporary work could not be made without incurring the liability of a permanent indebtedness.[92]

3. Procedure for dismissing a teacher or principal under tenure.

When a teacher under tenure is dismissed, the requirements of the law as to the procedure are mandatory and are clearly set forth. It may be noted that a board may dismiss a teacher who is not under tenure during the term of her contract without giving her a hearing, but the teacher may appeal from such action to the Commissioner of Education.

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[91] Gowdy v. Board of Education, 55 Vr. 231, 89 A. 1135.

[92] Reed and Hills v. Board of Education of Trenton, S. L. D., p. 148, decision of St. Bd., Jan. 19, 1918, reversing decision of Com. of Ed., July 26, 1917.

The first step involves preferring charges. These charges may be brought by a member of the board of education or by any other person.[89] They must be in writing and must be filed with the secretary or district clerk of the employing board. The act classifies the charges as of four types—(a) inefficiency; (b) incapacity; (c) conduct unbecoming a teacher; and (d) other just cause.[93]

The teacher has certain definite rights in such a case. She has a right to a hearing before the board of education, at which time the charges will be investigated; the law requires that she be given reasonable notice of the hearing; she may be represented at the hearing by counsel;[94] and has the right of appeal from any decision of the board to the Commissioner of Education,[94] and from his decision to the State Board of Education, and thence to the Supreme Court, if she so desires. In making such appeal, however, the teacher must not delay action unduly so that the board of education will be embarrassed by the delay. In a case appealed to the Commissioner, and thence to the State Board, in which a supervising principal who had been dismissed had delayed for three years the making of his appeal, Dr. John C. Van Dyke of the State Board stated that

> * * * Barhite was guilty of laches or negligence in not pressing his cause. * * * The matter could have been decided in three months, and the appellee should have pushed his claim to a decision. The consequences of his not doing so should fall upon his own head rather than upon the head of the Board of Education of West New York.[95]

On this ground, the State Board dismissed the appeal.

The school board likewise has certain functions in such cases to perform. While any person may file or prefer charges, only the school board may prosecute them, at least until the case has followed its course through the various tribunals established. In the case of Davis v. Overpeck (a later case than the one quoted above), certain citizens became annoyed at delays in the procedure, and attempted to prosecute the case themselves. The Commissioner, however, ruled that they could not do so, saying:

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[93] Code, Sec. 179.

[94] Code, Sec. 18.

[95] In the Matter of the Application of Jared Barhite to be reinstated as Supervising Principal of the School District of the Town of West New York, S. L. D., p. 177, decision of St. Bd., reversing decision of Com. of Ed., July 10, 1913. Decision of State Board affirmed by Supreme Court, Feb. 18, 1914, and by Court of Errors and Appeals, 86 N. J. L. 674.

> If citizens are dissatisfied with the action of public officials they may appeal to the courts in *certiorari* proceedings, but they can hardly take over the functions of the officials themselves and carry out their duties. The prosecution (or dismissal) of charges against a school teacher is the peculiar province of the local board of education. * * * Any citizen may file charges against a teacher with the local school board but he cannot take the initiative out of the hands of the board in either starting or dismissing or prosecuting a complaint.[96]

In addition to prosecuting the charges, the board must hear them or act as judge and jury upon the case,[97] it may summon witnesses and examine them under oath, which may be administered by any member of the board.[98] Finally, the board renders the decision.[99]

The legality of having members of the board perform the two functions of accusers or prosecutors and at the same time sitting as members of the trial board was attacked in the case of Gebhart v. Hopewell Township,[100] but was upheld by the Commissioner and by the State Board. Their contention was that numerous citations from cases before the courts showed this double function was permitted by the courts to administrative bodies where statutory authority was lacking, whereas in the case of school boards it was specifically granted by the Teachers' Tenure of Service Act.

It had originally been held by the Commissioner that in a hearing to dismiss a teacher under tenure, the board must see that a stenographic record of the testimony is taken, in order that in case of appeal to the Commissioner, there might be an exact record of proceedings on which to base judgment, since the hearing before the Commissioner is not one involving original jurisdiction, but only one for review.[101] In a later case, however, the State Board held that:

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[96] Davis v. Board of Education of Overpeck Township, State School Report, 1916, p. 209, decision of Com. of Ed., July 6, 1916.

[97] Code, Sec. 179.

[98] Code, Sec. 180.

[99] Code, Sec. 179.

[100] Gebhart v. Hopewell Township Board of Education, State School Report, 1928, p. 48, decision of Com. of Ed., Dec. 16, 1927. Affirmed by St. Bd., May 5, 1928.

> In the absence of any statute requiring or providing for a stenographic or other record of the testimony and proceedings * * * we cannot agree with this holding [that the Commissioner cannot hear appeals without such stenographic record to review]. It seems to us that to require stenographer's minutes, no matter how desirable they may be, is to assume a power which can be exercised only by the Legislature.[102]

The hearing before the board of education is especially important since the evidence there produced is the basis not only of the decision of the local board, but in case of appeal, also of that of the higher tribunals, which are neither required nor permitted to hear the case *de novo* in order to bring out new evidence. The decision in Schaaf v. Fort Lee illustrates this point:

> The State Board of Education has held in a number of cases, notably, Follmer vs. Board of Education of Jersey City, decided October 6, 1928; Wallace vs. Board of Education of Greenwich Township, decided February 7, 1931, and Conrow vs. Lumberton, 1928 Edition of Decisions, p. 186, that the only evidence to be considered in the dismissal of teachers or janitors is that established before the board of education and upon which it reached its determination.[103]

Furthermore, if the local board has arrived at any determination, as, for instance, that a teacher is inefficient, or insubordinate, and does so in good faith, the higher tribunals are not inclined to disturb such findings, unless it is evident that gross injustice is being done. This point is made clear in Greenwich Township v. Wallace:

> It is true that, as pointed out in the Commissioner's opinion their [county superintendent and helping teacher] testimony does not

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[101] White v. Board of Education of Readington Township, State School Report, 1927, p. 87, decision of Com. of Ed., Jan. 16, 1927.

[102] Follmer v. Board of Education of Jersey City, State School Report, 1928, p. 78, decision of St. Bd., Oct. 6, 1928, reversing decision of Com. of Ed., Mar. 20, 1928.

[103] Schaaf v. Board of Education of Borough of Fort Lee (In *MSS.*), decision of Com. of Ed., Mar. 11, 1931.

> establish an absolute failure on the part of the teacher, but we cannot say that it is not sufficient, in connection with the other testimony which was before the Board, to warrant it in holding that there was sufficient evidence to justify them in sustaining the charges of inefficiency and dismissing the teacher. Nor, judging of their [the Board's] conduct by the record made before the Commissioner, can we say that the board did not act in good faith, or that they were swayed by bias or prejudice. It might be that if the case were presented to us for our opinion on the evidence alone, we might disagree with their conclusion, but the power and duty of passing upon the charges was theirs under the law, and we cannot say that there was no justification for the finding which they made.[104]

If charges are brought against a teacher or principal, and presumably against any other person in the employ of the board of education, and the board, after a proper hearing, judges that the charges should not be sustained, the case is ended, and there is no appeal to the Commissioner. This is made evident by the following decision:

> The Tenure of Office Act provides that charges against a principal or teacher may be filed by any person, whether a member of the school board or not. This provision does not, in our opinion, afford any right of appeal if the Board does not sustain the charges. The purpose of the section in question is to protect principals and teachers in their tenure of office and, on that account, it requires that before they can be dismissed written charges must be filed against them upon which they are entitled to a hearing. They have a right to appeal to the Commissioner and to this Board from an adverse decision, but if the Board does not sustain the charges, its action is final, and those preferring them cannot carry their grievances to the Commissioner or this Board. Only the Board of Education can dismiss a principal or teacher, and it is such an act of dismissal from which appeals are taken to the Commissioner and this Board.[105].

A rather interesting feature of this decision is that although the act quoted is the Tenure of Service Act, the person against whom the charges were brought was the City Superintendent of Schools, who under the law is not under the protection of that act. Whether this was an error of the State Board of Education, or whether that body desired to establish a principle to hold in all cases of school employees charged with offenses, and merely used the Tenure of Service Act by analogy as a vehicle, is a matter for conjecture.

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[104] Board of Education of Greenwich Township v. Wallace (In *MSS.*), decision of St. Bd., Feb. 7, 1913, reversing decision of Com. of Ed., Oct. 9, 1930.

[105] Pearce et al. v. Burns and the Gloucester City Board of Education (In *MSS.*), decision of St. Bd., Jan. 6, 1923, affirming decision of Com. of Ed., June 5, 1922.

As was previously stated, the charges which may be brought against a teacher are classified by law under four heads—(a) inefficiency; (b) incapacity; (c) conduct unbecoming a teacher; (d) other just cause. It is proposed to show by illustration from cases involving discharge of teachers, how each of these terms has been interpreted and what it has been made to include.

(a) Inefficiency.

In at least two cases we find an attempt on the part of the Commissioner to define efficiency. As applies to a teacher, in the later case of Davis v. Overpeck, the Commissioner said:

> In considering the case of the Appellant as to his efficiency as a teacher, it is proper to consider what are the main qualities of an efficient teacher. It will perhaps be agreed that there are four that he must possess. First, he must have adequate knowledge of the subjects which he is teaching; second, he should have reasonable skill in presenting the subject matter; third, he should have sufficient personality to inspire pupils to the further pursuit of knowledge and education after leaving the high school; fourth, he should be industrious in the work which he attempts to do.[106]

As regards a teacher's or principal's efficiency, the Commissioner in the case of Marsteller v. Pleasantville, made the statement that

> In order to warrant the discharge of a teacher or principal on the general charge of inefficiency it must be clearly proven that unsatisfactory condition of the class or school is due to the inability of the teacher or principal, against whom charges are preferred, to impart instruction, maintain discipline, and work in harmony with the Board of Education by whom he is employed and with the teachers with whom he is associated.[107]

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[106] Davis v. Board of Education of Overpeck Township. See footnote 96 *supra.*

[107] Marsteller v. Board of Education of Pleasantville. See footnote 62 *supra.*

These two statements give us, therefore, the following tests for inefficiency:

(1) Inadequate knowledge of subject matter.
(2) Insufficient skill in presenting subject matter.
(3) Inability to inspire and guide pupils.
(4) Lack of industry.
(5) Inability to maintain discipline.
(6) Inability to work in harmony with school board and with other teachers.

Other specific characteristics which have been ruled to exhibit inefficiency sufficient to justify dismissal of a principal are:

(7) Lateness in opening school, without proof that such lateness was due to being on school business.[108]
(8) Failure to include in his work the basal features of a supervisory program, *i. e.*, study and criticism of lesson plans, conferences with teachers with reference to plans, review with teachers of lessons taught, giving of demonstration lessons, "is clearly evidence of inefficiency."[108]
(9) Failure to comply with regulations of the Superintendent concerning supervision.[108]
(10) Failure to perform routine work of principal, *e. g.*, turning over to attendance officer notices of truant pupils.[108]

As refers to a supervising principal, one case at least seems to hinge upon inefficiency.

(11) In this case the charge was that the supervising principal had spent too little time in supervision. The State Board decision said in part:

> The visiting of a school a day from fifteen minutes to an hour and a half does not constitute adequate or sufficient supervision on the part of a supervising principal whose whole time is supposed to be devoted to his office. * * * The duty of a supervising principal is primarily the supervision of instruction in the classroom. His other

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[108] Hamilton v. Board of Education of Town of Irvington (In *MSS.*), decision of Com. of Ed., Aug. 15, 1929, affirmed by St. Bd., Dec. 7, 1929.

> duties are of minor importance and call for no such expenditure of time as counsel suggests.[109]

One does not fail to contrast the generality of this charge made in 1917 with the specific professional charges made against the principal in the case of Hamilton v. Irvington in 1929, as noted in (7), (8), (9) and (10) above.

(12) An additional "good cause" for dismissal of a teacher under contract, under authority of Section 167 of the Code, would probably apply equally well to a teacher under tenure, and would probably be classified as inefficiency. This is failure to keep the classroom in sanitary condition.[110]

(13) Persistent tardiness on the part of a teacher in opening school at the proper time, especially after warnings by members of the board of education, is sufficient cause for dismissal of a teacher under tenure on charges of incompetency, inefficiency, and insubordination.[111]

Sometimes a board of education is very patient with inefficient teachers and loath to bring action against them. In one case this reluctancy was charged by an appellant as estopping the board from bringing charges. The State Board ruled, however:

> We cannot subscribe to a doctrine that a Board which, because of sympathy or other reason, tolerates an inefficient teacher, thereby estops itself and the public which it represents from dismissing her. If such were the law, a sympathetic or an incompetent, or a dishonest Board might confer a life tenure on an absolutely incompetent teacher.[112]

(b) Incapacity.

No definition for incapacity has been found in any decisions as was true of inefficiency. From the reports of cases read, however, it seems clear that the meaning of the term in the statute is physical or mental incapacity.

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[109] Fountain v. Board of Education of Madison Township. See footnote 84 *supra.*

[110] Albertson v. Greenwich Township, Warren Co., Board of Education, State School Report, 1927, p. 62, decision of Com. of Ed., Aug. 27, 1926.

[111] Blackus v. Board of Education of Delaware Township, State School Report, 1912, p. 122, decision of Com. of Ed., Sept. 9, 1912.

[112] Conrow v. Board of Education of Lumberton Township, S. L. D., p. 185, decision of St. Bd., Jan. 3, 1914, reversing decision of Com. of Ed., Apr. 18, 1913.

Two cases have come to light which are based on this charge. The first was that of Conrow v. Lumberton Township,[112] in which the State Board ruled that if a teacher is so deaf as to be unable to hear anything in a classroom without the aid of an acousticon, the board of education has adequate grounds on which to remove her for incapacity, especially since hearing with the acousticon was, to some extent, dependent on the direction from which the sound came.

In another case a board attempted to remove a teacher following a protracted illness due to childbirth. This involved a case of a teacher under contract, not under tenure. They advanced as one reason for dismissal a claim that on her return to service she was not in physical condition for duties, since the medical inspector of the school district had given it as his opinion that a woman was not physically able to undertake teaching duties three weeks after childbirth. The Commissioner in this case said:

> The testimony of the school medical inspector to the effect that a woman is not fit for work within a certain definite time after the birth of a child is in the Commissioner's opinion, too general a statement since conditions must necessarily vary in different cases. * * * When the appellant reported as ''ready, able and willing'' to perform her teaching duties * * * it is the Commissioner's opinion that the board of education had no right to deny her that opportunity in the absence of an actual demonstration of her physical unfitness.[113]

From these examples, it is evident that as in the case of inefficiency, the burden is upon the board of proving that incapacity exists, and exists to such a degree as to cause the teacher to be unable to perform the duties of a teacher normally and efficiently.

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[113] Vetter v. Board of Education of Township of Galloway (In *MSS.*), decision of Com. of Ed., Sept. 9, 1929.

(c) Conduct unbecoming a teacher.

A classification such as "conduct unbecoming a teacher" is capable of a great many interpretations and applications. It would seem to be concerned, however, with at least three phases of conduct, namely, (1) a lack of tact or judgment, (2) breach of professional ethics, and (3) infraction of commonly accepted principles of good character or morality.

An instance of a case arising under the head of lack of tact or judgment was that of Smith v. Phillipsburg. In this case, Smith, a teacher, had used his foot to "push" a pupil, as he said, and to "kick" him, as the friends of the boy testified, toward the principal's office. The Commissioner placed the issue squarely not upon the point of corporal punishment, which is forbidden by law, but upon the point of conduct unbecoming a teacher. "The boy was not injured," said the decision, "but the insult, the humiliation, quite as much as the injury, must be considered."[114]

The second type of unbecoming conduct, arising out of breach of professional ethics, was made an issue in the case of Hamilton v. Irvington, where the Commissioner ruled that such conduct as borrowing money from janitors or teachers, or selling them stock was unbecoming. Likewise, the Appellant was found to be slow in paying school bills, which he, as principal, was supposed to pay:

> This fact, together with the fact that through his own numerous obligations or those of his wife which he had assumed, he was known throughout the community to be constantly in financial arrears, was bound to impair his high standing as a school principal and his usefulness as such and to reflect indirectly discredit on the Irvington school system.[115]

The third type of unbecoming conduct, infraction of principles of good character or morality, was the cause for dismissal of a principal in Oliver v. Hoboken. In this case the Appellant admitted having met clandestinely another woman than his wife, his defense being that the meetings were concerned with assisting the woman to heal troubles in her own family. The Commissioner, in his opinion, said:

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[114] Smith v. Board of Education of City of Phillipsburg, S. L. D., p. 132, decision of Com. of Ed., Aug. 23, 1917, affirmed by St. Bd., Jan. 19, 1918.

[115] Hamilton v. Board of Education of Town of Irvington. See footnote 108 *supra.*

> The important question in the final analysis is, are the explanations of the clandestine meetings and the unusual situations in which the Appellant was found consistent with good morals, professional fidelity, and the common standard of social ethics. The Board of Education decided without a dissenting vote that these explanations were inconsistent and found Mr. Oliver guilty of conduct unbecoming a teacher. As a result he was dismissed from service as principal of the school. It is my opinion that this conclusion was a fair one.[116]

(d) Other just cause.

Under this fourth head are grouped a large number of cases, most of which may be classified as insubordination or as neglect of duty. An instance of insubordination occurred in a case[117] which arose concerning discharge of a teacher under contract, not under tenure. In this case a teacher was requested by the board to appear before them on a certain charge, but in refusing to do so wrote a letter to the board, and, in addition, made oral statements evidencing disrespect toward the members of the employing board and the principal. The Commissioner deemed this ''good cause'' for dismissal under Section 167 of the code, and it would undoubtedly have served as ''just cause'' under section 179.

In the case of Gebhart v. Hopewell Township, the teacher was found guilty of insubordination because

> * * * she repeatedly failed to report at school at the times directed by the high school principal and the supervising principal [and] ''for failure, refusal and neglect to file reports

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[116] Oliver v. Board of Education of City of Hoboken, S. L. D., p. 128, decision of Com. of Ed., May 22, 1917.

[117] Foy v. Board of Education of Borough of Woodridge (In *MSS.*), decision of Com. of Ed., Dec. 10, 1929.

and furnish information as and when requested by'' the high school principal.[118]

One of the most notable cases appealed to the Commissioner and thence to the higher tribunals, that of Cheesman v. Gloucester City, brought out the fact that a teacher who is transferred and refuses to take up the duties of the new position to which she is assigned, pending an appeal to the Commissioner of Education, under the assumption that the transfer was illegal, acts at her peril. The decision of the Supreme Court in this case stated:

> It is further contended that Miss Cheesman could not be guilty of insubordination and dismissed pending her appeal of the order of transfer to the State Commissioner of Education. We do not think this point well taken. Miss Cheesman could have taken up the work in the Cumberland Street School, to which she was transferred, under protest pending her appeal. Such a course would not have prejudiced her appeal. She chose to assume in her actions that the transfer was illegal. In this Miss Cheesman acted at her peril. If the transfer was legal it necessarily follows that she was guilty of insubordination in refusing to obey the order and that the Board was justified after charges had been preferred and notice given to hear the case and order a dismissal, if it chose so to act.[119]

An equivalent decision was given in the case of Welch v. West Orange.[120]

In most cases, failure to obey rules and regulations and instructions of the board of education or of other superiors would be construed as insubordination. In a few cases, however, the teacher has been justified by the decisions rendered. In the case of McCain and McCain v. Harrison,[121] the Commissioner ruled that when teachers are under benefit of the Tenure of Service Act, and are notified to appear before the board employing them to answer certain charges, the fact that they do not appear either personally or by counsel does not relieve the board of its duty to examine into the charges, if any were filed, neither was their failure to appear insubordination or unprofessional conduct. It was optional with the teachers as to whether or not they should be present at the hearing.

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[118] Gebhart v. Hopewell Township Board of Education. See footnote 100 *supra.*

[119] Cheesman v. Board of Education of Gloucester City. See footnote 75 *supra.*

[120] Welch v. Board of Education of West Orange, S. L. D., p. 197, decision of Com. of Ed., Feb. 13, 1914, affirmed by St. Bd., Apr. 4, 1914.

[121] McCain and McCain v. Board of Education of Harrison, State School Report, 1915, p. 50, decision of Com. of Ed., Mar. 19, 1915.

In a second case, that of Gammon v. Leonia,[122] the Commissioner decided that it is no insubordination on the part of a teacher of commercial subjects, who is under tenure, to refuse to perform clerical duties in the office of the supervising principal, since this would be a demotion from her position as teacher in the commercial department of the high school.

Aside from insubordination, another charge frequently brought against teachers under the head of "other just cause," is neglect of duty or absence from duty. The decisions show that absence from duty in itself is not sufficient to justify dismissal. The absence must have been for unjustifiable reason, or for an unreasonable length of time, or, if the teacher is under contract, must have been foreseen, to be just or good cause for dismissal. In the case of Vetter v. Galloway Township, where the teacher, under contract, not under tenure, had been absent for an extended period of time owing to expectant motherhood, the Commissioner denies the right of the board to terminate the contract. He held that if a teacher's absence from her duties is due to

> * * * illness which could not have been foreseen by her at the time she entered into her teaching contract, [such absence is] an entirely justifiable one.[123]

In the case of Nommensen v. Hoboken, one of the charges against the teacher was that she had broken one of the rules of the board, which provided

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[122] Gammon v. Board of Education of Leonia, Bergen Co., State School Report, 1921, p. 310, decision of Com. of Ed., Mar. 10, 1921.

[123] Vetter v. Board of Education of Township of Galloway. See footnote 113 *supra.*

> * * * that the position of any teacher remaining absent for a period of one month without permission of the Board of Education should be considered vacant and should be filled accordingly.[124]

Since the teacher's absence was due to the necessity of taking care of her mother, who was seriously ill, and since the teacher had been led to believe that her request for a leave of absence had been granted, the ruling of the Commissioner was that

> * * * Neither in the opinion of the Commissioner can the so-called violation of Respondent's rule regarding absence for one month or more without leave be deemed in this case insubordination or conduct unbecoming a teacher so as to justify dismissal under the Tenure Law.[124]

In the case of Garrison v. Township of West Deptford,[125] a teacher had requested permission of a district clerk for leave of absence prior to Christmas holidays, at which time she desired to take advantage of an opportunity to increase her usual earnings by working as clerk in a postoffice. Not having received formal permission, she nevertheless left her teaching duties to take the other employment. The Commissioner ruled that absence from teaching duties without permission from the board constituted a "good cause" for dismissal under Section 167 of the Code, and was a vital breach of contract.

It may perhaps be asked whether for teachers under tenure marriage may be construed by a board of education as "just cause" for dismissal. In the case of Nommensen v. Hoboken, quoted just above, the Commissioner of Education and the State Board, as well, ruled that it could not. In this case the board of education had a rule which stated that the marriage of a teacher should be considered equivalent to her resignation. The Commissioner's statement was as follows:

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[124] Nommensen v. Hoboken Board of Education, S. L. D., p. 166, decision of Com. of Ed., Jan. 4, 1923, affirmed by St. Bd.

[125] Garrison v. Board of Education of Township of West Deptford, State School Report, 1927, p. 110, decision of Com. of Ed., June 14, 1927.

> Plainly the violation by Appellant of Respondent's rule regarding marriage cannot in itself be considered inefficiency, incapacity, or conduct unbecoming a teacher, and cannot therefore be sufficient cause under the Tenure Law to justify her dismissal.[124]

One may note that in the various cases involving dismissal of teachers, the same offense is sometimes given a different classification. For example, in the case of Hamilton v. Irvington,[126] lateness on the part of a teacher was termed by the accusing board "inefficiency"; in the case of Gebhart v. Hopewell Township it was charged against the teacher as insubordination.[127] In the case of Van Horn v. Hope Township we find that

> * * * in view of the total disregard shown by the appellant for the known rules of the Board of Education and lack of service to the children as shown in regard to the hours of opening and closing school [opening 9.30 to 10 o'clock, closing sometimes 1 to 2 hours early] and in view of the irregularities committed by appellant in the keeping of her school register, the Commissioner is of the opinion that the dismissal of appellant * * * on the grounds of insubordination, unprofessional conduct and conduct unbecoming a teacher was justified.[128]

4. Conditions under which a teacher under tenure may be removed by a board of education without charges or a hearing.

Practically all of the cases discussed in the foregoing section referred to situations where charges were brought against teachers and hearings given as conditions antecedent to dismissal. There is one situation, however, where such preferring of charges and giving of hearings are not required by law. This occurs when a teacher is found not to be the holder of a proper certificate in full force and effect.[129] If a teacher under tenure lacks a proper certificate, or if such certificate expires even during a school term, she is subject to immediate dismissal by the board without the usual legal formalities. In the case of Bagnell v. Bayonne,[130] however, a situation arose in which the expiration of a certificate was not fatal to the teacher's cause, since he had an additional certificate in full force and effect on which to rely. He had been a teacher in a school for special or atypical children, and his certificate had expired. The board discharged him, but, on appeal, it was revealed that he was the holder of a certificate in full force and effect for teaching in another department of the schools. The Commissioner, therefore, held that the board of education was not justified in dismissing him, and that they should give him employment in the department in which he was certificated.

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[126] See footnote 108 *supra.*

[127] See footnote 100 *supra.*

[128] Van Horn v. Hope Township Board of Education (In *MSS.*), decision of Com. of Ed., Nov. 23, 1922.

[129] Code, Sec. 181.

There occurred in another case an instance where a board attempted to discharge a teacher without formal charges, or a hearing. In the case of Nommensen v. Hoboken, rules and regulations of the board specified that marriage of a female teacher or absence without leave beyond a period of a month should automatically act to create a vacancy in the position of such teacher. The Appellant was charged with breaking both of these rules and was summarily dropped. The State Board, however, ruled that:

> No rule or by-law of a board of education which conflicts with the Teachers' Tenure of Service Act is enforceable. The board can, if it so desires, pass a rule or by-law concerning the effect of marriage and against absence without leave, but under the Tenure of Service Act, no teacher can be discharged unless charges are preferred against her, she is given a fair hearing to answer them, and it is found after such a hearing that she is guilty of inefficiency, incapacity or conduct unbecoming a teacher, or "other just cause" appears to justify her dismissal. The action of the Appellant in enforcing its rules and refusing Mrs. Nommensen a hearing was therefore contrary to the statute. * * *[131]

5. Resignation of teacher under tenure.

The Teachers' Tenure of Service Statute of 1909 gave the teacher a large measure of protection from dismissal after she had established tenure. A supplement to this act, P. L. 1922, Chap. 206, gave the school district added protection against sudden resignation of such teachers. This required that:

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[130] Bagnell v. Board of Education of City of Bayonne, State School Report, 1915, p. 61, decision of Com. of Ed., Nov. 1, 1915.

[131] Nommensen v. Hoboken Board of Education. See footnote 124 *supra*.

> Any teacher, principal or supervising principal, under tenure of service, desiring to relinquish his or her position, shall give the employing board of education sixty days' written notice of such intention, unless the local board of education approve of a release on shorter notice.[132]

This act also provided that any teacher failing to give such notice should be deemed guilty of unprofessional conduct and subject to suspension of certificate by the Comsioner of Education for a period of not over one year.

It should be noted, however, that the resignation of a teacher is not effective until accepted by the board of education, and may be withdrawn prior to such acceptance.[133] A further rule which applies to resignation of municipal officers, and has likewise been made to apply to teachers, is that

> A municipal office can only be resigned by being made to and accepted by the body having the power to fill the vacancy.[134]

This principle is further amplified in the following rule:

> It is not * * * to the appointing power * * * that, according to the rule, the power of accepting the resignation is committed; such power is entrusted to the body or office authorized to fill the vacancy.[135]

These legal principles were the basis of the decision of the court in the case of Nicholson v. Swedesboro, which reads in part as follows:

> The supervising principal of a school district tendered to the district board of education her resignation to take effect at a date after April 1, 1911. On March 31, 1911, the board decided not to accept the resignation and so notified the incumbent on April 1, 1911. On April 3, 1911, the board [whose personnel changed on April 1] summarily and without notice to the party affected accepted the

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[132] Code, Sec. 182.

[133] Straughen v. Board of Education of Township of Upper Penn's Neck. See footnote [58] *supra.*

[134] State ex rel. Reeves v. Ferguson 31 N. J. L. (2 Vr.) 107, 129.

[135] Fryer v. Norton, 67 N. J. L. (38 Vr.) 23.

> resignation. Held, that such action was invalid (1) because the acceptance of the resignation was not pending on April 3, 1911; (2) because no notice or opportunity to be heard was afforded to the party affected by the summary action.[136]

It will be noted that the board as constituted on April 1, by refusing to accept the resignation, closed the consideration of the resignation as then pending. The board as constituted on April 3, by accepting her resignation, opened a new case, and, in effect, dismissed the teacher, an action which requires preferring charges and giving a hearing.

6. Miscellaneous decisions concerning tenure.
   (a) A teacher cannot defeat the purposes of the Tenure Act by waiving her rights under tenure. An opinion by Hon. Edward L. Katzenbach, Attorney-General of the State of New Jersey, to Assistant Commissioner of Education C. J. Strahan, rendered on May 23, 1924, was as follows:

> It will be noticed that the Act of 1909, as above cited, provides that after three consecutive years of service the tenure should be during good behavior and efficiency, and is not so worded as to indicate that the intention of the Legislature was merely to provide for the class mentioned in the statute a personal privilege but indicates to my mind that the legislative intention was the expression of a public policy for the benefit of the school system. * * * I find nothing in the Act of 1909 which authorizes the board of education to expressly contract for the services of a teacher by an agreement entered into after three consecutive years of service.[137]

This principle was applied in a decision by the Commissioner of Education in the case of White v. Hillsdale, as follows:

> Appellant * * * could not, in the Commissioner's opinion in any event be legally held to a waiver of the benefits of legislation which, according to an opinion of the Attorney-General, was enacted not as a matter of personal privilege but of public policy for the benefit of the school system.[138]

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[136] Nicholson v. Board of Education of Swedesboro, 54 Vr. 36. Appealed from Commissioner of Education and State Board of Education. See S. L. D., p. 202.

[137] *Education Bulletin,* Vol. 11, No. 2, Oct., 1924, p. 46.

[138] White v. Board of Education of Borough of Hillsdale. See footnote 66 *supra.*

An equivalent decision was rendered also in the case of Tomlin v. Glassboro.[139]

(b) Constitutionality of Tenure of Service Act.

In the case of Marsteller v. Pleasantville,[140] the State Board of Education, at a meeting held December 7, 1912, although recognizing the fact that determination of the constitutionality of legislation was a province of the courts, yet decided, in the absence of such court decisions, that the Teachers' Tenure of Service Act of 1909 was not in violation of the provisions in the State Constitution, prohibiting the enactment of laws violating the obligations of contracts. The State Board reiterated this conclusion in the case of Clayton v. Orange,[141] and on the same ground of attack, namely, that the law impaired the obligation of contracts.

B. The Veterans' Tenure Act.

At the beginning of the discussion of Teacher Tenure, it was pointed out that there were two acts under which tenure might be secured by certain teachers. The first is the Teachers' Tenure of Service Act, P. L. 1909, Chap. 243, the provisions of which have been discussed in preceding pages. The other act is the so-called "Veterans' Tenure Act," which, as amended, is found in P. L. 1929, Chap. 29. This law covers any person

> * * * who has served as a soldier, sailor or marine, in any war of the United States, or in the New Jersey State Militia during the period of the World War, and has been honorably discharged from the United States service, or from the New Jersey State Militia service, prior to or during such employment in or occupancy of such position or office.

The act prohibits the discharge of any such person who at the time of the passage of the act or thereafter should be employed by the state or any of its political subdivisions,

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[139] Tomlin v. Glassboro Board of Education. See footnote 83 *supra*.

[140] Marsteller v. Board of Education of Pleasantville, N. J. School Law, 1918, p. 434, decision of St. Bd., Dec. 7, 1912, reversing decision of Com. of Ed., May 9, 1912.

[141] Clayton v. Board of Education of City of Orange, S. L. D., p. 195, decision of St. Bd., Feb. 7, 1914, affirming decision of Com. of Ed., Apr. 18, 1913.

> * * * including any person employed by a school board or board of education * * * whose term of office is not now fixed by law, and receiving a salary from such state, [political subdivision or school board] * * * except for good cause shown after a fair and impartial hearing * * * [but such person] shall hold his position or office during good behavior, and shall not be removed for political reasons.

Since this law covers only those persons "whose term of office is not now fixed by law," there would be only rare cases where it would apply to teachers, since the terms of teachers before acquiring tenure are practically always fixed either by the terms of the contract or by rules and regulations of the board, both of which, as will be shown, have been interpreted as being "fixed by law." The complete discussion of the operation of this law and of the decisions based upon it will, therefore, be deferred to the chapter in which other employees than teachers are discussed.[142]

VI. The Compensation of Teachers, Principals, and Supervising Principals

The requirements of the law concerning the amount of compensation to be paid teachers and principals are very simple and meager. Not since 1919 has there been any revision of the minimum salary law, whose entire statement is that

> The minimum salary of any teacher in any school district of this State shall be seventy dollars per month, for each and every month during the school year when employed.[143]

Except as indicated below, all further legislation concerning the amount of salaries is left to local municipalities and school districts.

While the Code[144] establishes a minimum salary of $1000 per year for supervising principals, the Rules and Regulations of the State Board of Education[145] have required a minimum salary of $3000 per year for an approved supervising principal. For an unapproved supervising principal or supervisor of schools no minimum salary is fixed.

There are three ways in which the amount of teachers' salaries in school districts may be set. These are:

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[142] See Chapter XI, pp. 355–357.

[143] Code, Sec. 535.

[144] Code, Sec. 131.

[145] Rules, No. 74, p. 509.

A. By rules and regulations of the board of education,[146] usually in the form of salary schedules, which may cover both teachers under tenure and those not under tenure.

B. By the provisions of Article XXVI[147] of the School Code, passed in 1903, which provides for a schedule of minimum salaries based on type of experience and position. In order to become effective this salary schedule must first by resolution of the governing body of the municipality, not by the school board, be submitted to the voters for adoption.

C. By resolution of the board of education, an action which must be taken by a majority vote of the whole number of members of the board.[148] In the case of a teacher not under tenure, this amount voted as salary must be specifically stated in a written contract, unless the board has rules and regulations covering salaries.[149] In the case of a teacher under tenure, there is no contract required, according to the opinion of the Attorney-General as given above,[150] but the amount of salary set is always a matter of record by the clerk of the school district or the secretary of the board.

The one specific requirement concerning the formulation of salary schedules for teachers, whether in school districts or in schools or other institution supported wholly or in part by state funds, is that there must be no discrimination on account of sex.[151] This rule against sex applies to ''appointment, assignment, compensation, promotion, transfer, resignation, dismissal and all other matters pertaining to the employment of teachers.'' This law, passed in 1925, was a source of some confusion with boards which had salary schedules and some of which had provided for variation in salary on the basis of sex. In the case of Stauffer v. Perth Amboy it was brought out that the salary schedule as revised by the board had attempted to adjust differences between the sexes by providing for both men and women teachers a common maximum salary to be reached after a period of years. The Commissioner declared that this single provision did not eliminate sex discrimination, and stated that some plan must be adopted by which teachers of both sexes doing the same work and with equal qualifications would be given equal pay year by year, with the exception of any "already existing higher salaries in which certain tenure teachers have vested rights."[152]

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[146] Code, Sec. 165.

[147] Code, Secs. 328–330.

[148] Code, Sec. 89.

[149] Code, Sec. 165.

[150] See footnote 139 *supra.*

[151] Code, Sec. 166.

There has been some difference of opinion between the judicial tribunals as to what constitutes a "scale of wages" or a "salary schedule." The fundamental definition of such a scale so far as concerns its legal implications is found in the following decision by the State Board:

> Is the annual adoption of a resolution employing teachers and fixing their salaries and fixing the salaries of teachers already employed and under tenure a "formulation of a scale of wages"? We think not. In our opinion, what is contemplated by the language of the statute above quoted is the formulation (putting into an established or permanent form) of a scale or schedule of wages which is to have prospective operation, with or without definite annual increments for certain positions or employments, the adoption of which would deprive the adopting board of discretion in fixing future salaries in conflict therewith, except by formal amendment or repeal of the action adopting the scale or schedule. If the fixing of salaries by the use of a list of teachers showing present salaries and increasing some or all according to the recommendations of the school executive based on the performance of each teacher, is adopting a schedule every board could be held to have adopted a salary scale or schedule.[153]

In the same case, the opinion of the Commissioner was that discrimination in respect to salaries as between single and married women teachers is not illegal as being a policy in restraint of marriage:

> The salary of a teacher under tenure cannot be reduced. It seems improbable that the knowledge that a salary might not be increased would restrain a woman from marriage when the salary she was receiving before marriage would be continued to her and become a supplement to the salary of the husband. The Commissioner must, therefore, conclude that this discrimination so far as single and married women teachers are concerned is not against public policy.[153]

Teachers' salaries are to "be paid in equal monthly installments, not later than five days after the close of each month while the school shall be in session.''[154] This act also construes such a month to be ''twenty school days or four weeks of five school days each, * * * unless otherwise specified'' in the contract. In a case which appeared before the Supreme Court in 1893, a teacher who had been discharged brought action to recover salary which he claimed was still due, on the basis of his having been paid by the calendar month. The opinion of the court was in part:

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[152] Stauffer v. Board of Education of Perth Amboy (In *MSS.*), decision of Com. of Ed., Aug. 1, 1929.

[153] Morgenweck et als. v. Board of Education of Gloucester City (In *MSS.*), decision of St. Bd., July 12, 1930, reversing decision of Com. of Ed., Jan. 8, 1930.

> Held, in an action by a teacher who had been paid by the calendar month, that he could not recover an illegal balance of salary without proof as to how many ''school months'' there actually were during his service.[155]

A. *Withholding the Teacher's Salary*

There are several reasons for which a teacher's salary may be withheld:

1. It is not to be paid until the school register is ascertained by the district clerk or other proper authority to have been kept properly, and a certificate to that effect is entered in the register;[156]
2. Nor at the end of the school term until the county or city superintendent notifies the district clerk or other proper authority that the teacher has filed the annual report required;[156]
3. Nor at the end of the school term until the district clerk or other proper authority receives notice that the teacher's register and report of attendance have been filed in the office of the Commissioner of Education, except that in districts having a supervising principal or a superintendent, the filing of such register and report in his office shall be sufficient compliance with the rule;[157]
4. No teacher is to be paid any salary unless he is the holder of an appropriate teacher's certificate;[158]
5. The salary of any teacher shall be withheld at the order of the Commissioner of Education in case such teacher neglects

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[154] Code, Sec. 165.
[155] Steinson v. Trustees of School Dist. No. 8, 55 N. J. L. (26 Vr.) 567.
[156] Code, Sec. 169.
[157] Rules, No. 76, p. 510.
[158] Code, Sec. 174.

or refuses to perform any duty imposed by school law or by the rules and regulations of the State Board of Education.[159]

B. Deductions from the Teacher's Salary

No specific provision is found in the law governing deductions from teachers' salaries because of absence from duties or other similar causes. It is probable that the authority to make such deductions is covered by the provision that a board of education may make rules and regulations concerning teachers' salaries.[160] There are at least three cases, however, in which the board is not permitted to make deductions from teachers' salaries even when the schools are closed. The first instance occurs when "a school day happens to be a day declared by law to be a public holiday,"[161] since the teacher cannot be required to teach on such a day. The second case arises when a school is closed because of epidemic or other unavoidable reason. The authority for this rule is found in the case of Conley v. Raritan Township, in which the following decision was made:

> If the schools are closed by reason of epidemic or any other cause that may be unavoidable, such as the shortage of fuel, and teachers are present and ready to serve the school district there can be no deduction made from their salary. The furnishing of proper school facilities, such as having the rooms properly heated, is a duty of the board and is a matter that lies entirely without the control of the teacher.[162]

The third case in which deductions are forbidden exists when a teacher, principal, supervisor, or superintendent is absent from duty to attend the annual convention of the New Jersey State Teachers' Association, for a period of not over two days each year.[163]

C. Reduction of Salary of Teachers

There is no provision in law for conditions under which the salary of a teacher under contract may be reduced. This is a matter for rules and regulations of the board or for specific action.[160] In the case of a teacher under tenure, any reduction in salary is forbidden.[164]

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[159] Code, Sec. 26.

[160] Code, Sec. 165.

[161] Code, Sec. 170.

[162] Conley v. Board of Education of Raritan Township, Middlesex Co., State School Report, 1918, p. 192, decision of Com. of Ed., Aug. 1, 1918.

[163] Code, Sec. 171.

D. Recovery of Salary in Case of Dismissal, etc.

In certain cases, when a teacher is dismissed, she can recover salary for services performed. If a teacher under contract is dismissed by a board before the expiration of her contract, and the dismissal is

> * * * upon appeal decided to have been without good cause, such teacher shall be entitled to compensation for the full term for which said contract shall have been made.[165]

In a case which arose in 1878, the district in which the teacher was employed was consolidated with another district. The court ruled:

> The plaintiff's right to recover for services as teacher is not barred by the fact that he was employed by the trustees of a district afterwards consolidated with another district, the new district having become entitled to all the property, rights and assets of, and liable to all just claims against the several districts.[166]

The method of recovery is to appeal to the Commissioner of Education, and thence, if necessary, to the higher tribunals established. If the teacher wins his case, and the board fails to pay for services for which compensation has been declared due, the procedure is indicated in the following quotations:

> 1. A school teacher who has litigated successfully before the state superintendent the controverted questions upon which her right to compensation depends, is entitled to a writ of mandamus to enforce a decision in her favor. In such case the only burden upon the relator is to show that the jurisdiction of the state superintendent extended to the matter in dispute and over the parties in controversy.[167]
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> 2. A school teacher who has rendered service according to the requirements of the school law, and is refused compensation out of the fund specially provided for that purpose, is entitled to a mandamus to compel the proper officers to perform their duty, and make payment of what is

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[164] Code, Sec. 179.

[165] Code, Sec. 167.

[166] Sproul v. Smith, 40 N. J. L. (11 Vr.) 314.

[167] Thompson v. Board of Education, 28 Vr. 628 (1895).

justly due. It [mandamus] lies against school trustees, who refuse to pay a teacher his salary, legally earned.[168]

3. The action [by a teacher to recover salary] must be brought against the district by its corporate name, and not against the trustees in their individual names, with the description appended of "Trustees, etc."[164]

It was stated earlier that a teacher who holds no valid certificate is not entitled to salary. However, this contention must be made in good time in the hearing of the case:

> In an action brought by a teacher to recover of the trustees of a school district for services as a teacher, an objection that the plaintiff was not the holder of a proper teacher's certificate in full force and effect cannot be made after the evidence is closed and the cause is being summed up.[166]

In the case of Tomlin v. Glassboro,[169] the teacher, who was under tenure, was discharged, but on appeal was ordered by the Commissioner to be reinstated and salary paid from the date of dismissal. However, the board of education discontinued the course taught by the teacher, and was on second appeal declared to be liable for the full salary of the teacher up to the date of discontinuance of the course, notwithstanding that the teacher had in the meantime secured other employment, and no deduction was permitted to be made by the board from the amount due the teacher on account of earnings in such employment. Such deductions for earnings from other employments have been allowed in numerous cases, but this action may be taken only by the courts, and not by the Commissioner or the State Board of Education:

> The Commissioner is without authority under Section 165, Article VIII, page 109, of the 1925 Compilation of the School Law [Section 167, 1928 Code], above referred to, to fix any damages, as Appellant suggests in his brief, by deducting the amount Appellant has been earning since the date of his dismissal from the compensation due him. Such fixing of damages would be a function of a Court of Law and not of the Commissioner * * *.[170]

VII. THE FUNCTIONS OF TEACHERS, PRINCIPALS, AND SUPERVISING PRINCIPALS. (DUTIES, POWERS, RIGHTS, PROHIBITIONS).

Division of the teaching and supervisory staff of a school system into classes for discussion is not made easy, either by the laws or by decisions. In addition to the three classes of teachers, principals, and supervising principals, there may be supervisors, assistant superintendents, and a superintendent. There are also in each county the county superintendent and the helping teachers. There are principals and teachers in county vocational schools, which are under a third distinct unit of control. It seems probable that the provisions given below as established by law or by decisions apply to all of the personnel named, except in many cases to city superintendents, assistant city superintendents, helping teachers, and county superintendents. These positions are, therefore, excluded from this portion of the discussion, and their functions will be described elsewhere. It is assumed, further, that supervisors of special subjects or groups of grades, who serve under supervising principals or superintendents, may be classified as teachers, but where the term is used to refer to ''unapproved'' supervising principals, they would be classified as supervising principals.

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[168] Apgar v. School Trustees of District No. 4, 5 Vr. 308.

[169] Tomlin v. Glassboro Board of Education, 1 N. J. Misc. Rep. 568.

[170] Davis v. Board of Education of Town of Boonton. See footnote 67 supra.

The term ''principal'' represents a position intermediate between the teacher, and either the board, the supervising principal, or the superintendent. It covers a wide variety in types of position. In its lowest type it means a head-teacher in a two-teacher school, since the law requires by implication that in every school in which there is more than one teacher, one of them shall be designated the principal.[171] In its position of greatest responsibility, it would represent the head of a large urban school, responsible to the superintendent of schools, and doing no teaching, or the head of a local school system which has no supervising principal, but with duties corresponding in many cases to those of the latter. Such a principal is referred to in the case of Welch v. West Orange:

> A principal of a school is a person who devotes all or nearly all his time to supervising the work of the classes in his building, and very little, if any, time to class teaching.[172]

This can scarcely be adopted as an inclusive definition. It would seem probable that under the term ''principal'' may be included those members of the teaching staff of a school organization who are appointed and designated by the controlling board of education to have responsibility for such administrative and supervisory duties as are required by law for such positions, and as may be required by the rules and regulations of the board, and whose allotment of time between teaching, supervisory, and administrative duties is fixed by such board. This would seem to exclude "approved" supervising principals, whose functions are so fixed by law and by the rules and regulations of the State Board as to forbid teaching duties, but would obviously not exclude "unapproved" supervising principals who are not forbidden to teach. The one thing obvious is that there is no clear line of demarcation between the different types of position as established by law, and it will be equally evident that the specific functions of each as assigned by law are poorly defined and too frequently refer to duties which are incidental rather than intrinsic, and those assigned by State Board rules tend to restrict the responsibilities of supervising principals to only one field of operations, the supervisory.

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[171] Code, Secs. 169, 172, 421; Rules, No. 76, p. 510.

[172] Welch v. Board of Education of West Orange, S. L. D., p. 197, decision of Com. of Ed., Feb. 13, 1914, affirmed by St. Bd., Apr. 4, 1914.

A. Supervising Principals

As provided in Section 131 of the School Code, a local board, or boards of two or more districts jointly, or as provided in Section 209, the board of education of a union-graded school may appoint a supervising principal and define his duties under such rules and regulations as the State Board may make. In accordance with these provisions, the State Board has established rules which describe the functions of a supervising principal to be as follows:[173]

1. Supervisory.
    (a) Visit the schools under his control.
    (b) Supervise instruction in the classrooms of such schools.
        (1) Consult with teachers and advise as to methods of instruction and procedure for securing best results.
        (2) Advise as to discipline.
        (3) Advise as to preparation of lessons and recitations.
        (4) Advise as to organization of work—times and periods of classroom work, intermissions.

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[173] Rules, No. 75, p. 509.

        - (5) Advise as to examinations.
        - (6) Advise as to all other matters directly related to instruction.
- 2. Administrative.
    - (a) Select and prepare for district clerk lists of textbooks and school supplies, but not purchase or distribute same.
    - (b) Ascertain and report if teachers are properly certificated.
    - (c) Reports—
        - (1) Make monthly reports on schools to board of education and to county superintendent.
        - (2) Report to Commissioner and State Board when required.
    - (d) Act as ex-officio member of board of trustees of free public library.[174]

In addition to these duties, a number of others are imposed, and a number of privileges or prohibitions expressed which are common to all principals and which will be listed in the discussion relating to principals. Among these is the right or power to make rules for the government of the schools, the principals and teachers, and the pupils, in the absence of rules made by the board.

That the essential function of the supervising principal is regarded by the law and by the State Board of Education as lying in the supervisory field is evidenced by an opinion of the latter in the case of Fountain v. Madison Township:

> The duty of a supervising principal is primarily the supervision of instruction in the classroom. His other duties are of minor importance.[175]

While school administrators will probably find the first part of this ruling in accord with expert educational opinion, there will undoubtedly be difference of opinion as to the desirability of a situation where all other duties than supervisory are regarded as of minor importance. Under its own rules, the State Board could scarcely have ruled otherwise, but it may be questioned whether the best results are obtained by separating from the office those important administrative responsibilities which, when properly performed, make possible a more efficient supervisory program of work. The allocation of these administrative duties to the district clerk or to committees of the board results only in divided responsibility as to school policy, and is likely to result in inefficiency and waste motion. It may be questioned whether it should be left entirely to rules and regulations of the local board, or to common consent between supervising principal and board, to establish legally the administrative functions which should belong to a position of so much importance. Such activities as recommending teachers for appointment, promotion, transfer, assignment, and dismissal; assignment, promotion, and transfer of pupils; preparation of the annual school budget; supervision of school plant and its management; and recommendations as to general school policy might well, it would seem, be given definitely by law or by rules of the State Board to this office.

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[174] Code, Sec. 690.

[175] Fountain v. Board of Education of Madison Township. See footnote [84] *supra.*

B. Principals

So far as established by law, the position of principal is, in general, one of head-teacher, or one designed to perform certain routine functions concerning discipline and reports. All other functions are left to determination by rules and regulations of local boards. The following are specifically charged by law or State Board rules and regulations:

1. Make an annual report to the county or city superintendent on blanks furnished by the Commissioner of Education;[176]
2. Suspend pupils and report same to board of education;[177]
3. Conduct fire drills and see that furnace room and fire doors are closed during school hours, and require teachers to keep doors and exits unlocked;[178]
4. File registers and reports with Commissioner of Education at close of school year, or with city superintendent or supervising principal if serving under such;[179]
5. Arrange for lectures on accident prevention and industrial, home and school hygiene;[180]

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[176] Code, Sec. 169.

[177] Code, Sec. 172.

[178] Code, Secs. 421 and 423.

[179] Rules, No. 76, p. 510.

[180] Code, Sec. 614.

6. Act as member ex-officio of free public library board, if there is no superintendent or supervising principal.[174]

That a principal has power not specifically granted by law was made evident in the case of Gebhart v. Hopewell Township. This power, that of making rules for the government of the school and of teachers, is an evidence of legislative power existing in an executive officer:

> In the absence of other rules by the board of education or supervising principal it is well within the inherent power and duty of his office for the principal to make reasonable rules for the proper organization of his school. Such power on the part of the principal to make reasonable rules for the effective organization of his school is recognized as the common law of school procedure. * * * It is therefore the opinion of the Commissioner that in the absence of rules of the board of education or supervising principal, the principal had the authority and it became his duty to make reasonable rules as to the time the teachers should arrive at school before sessions or to remain at school after sessions and also to make rules in relation to the type of reports to be made by teachers and the time of filing such reports; and that upon failure to appeal to a higher authority against such rules so formulated by the principal, the teacher is bound to observe them.[181]

C. Teachers

Aside from the primary duty of a teacher to give instruction and guidance, which are not specified in statute law, we find that the law and the State Board rules specify a number of other duties and powers for teachers. These may be enumerated as follows:

1. Curricular duties.
    (a) Conduct programs on Arbor Day and on last school day preceding Lincoln's Birthday, Washington's Birthday, Memorial Day, Thanksgiving Day, and other patriotic holidays established by law;[182]
    (b) Read at least five verses of Scripture in presence of pupils daily, or cause same to be read;[183]
    (c) Teach nature of alcoholic drinks and narcotics and their effects;[184]

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[181] Gebhart v. Hopewell Township Board of Education. See footnote 100 *supra.*

[182] Code, Secs. 346 and 348.

[183] Code, Sec. 177.

[184] Code, Sec. 342.

    (d) Teach lessons on accident prevention;[185]
    (e) Teach lessons on fire prevention;[186]

2. Duties and powers respecting pupils.
    (a) Hold pupils accountable in school for disorderly conduct on the way to or from school, or on the playgrounds of the school, or during recess;[187]
    (b) Suspend from school any pupil for good cause (unless there is a principal, who would have this authority), and report same forthwith to the board of education.[187]

D. Duties, Powers, and Prohibitions Common to Teachers, Principals, and Supervising Principals

1. May, on application to board of education, attend annual convention of New Jersey Teachers' Association, for not over two days, without loss of salary;[188]
2. Must attend annual teachers' institute;[189]
3. If under tenure, must give sixty days' notice in case of resignation;[190]
4. Must not attend school if residing in home having certain contagious diseases, without certificate from proper health authority;[191]
5. Must not be agent for or interested in sale of textbooks or school supplies, apparatus, or equipment or receive reward for such sale;[192]
6. Not required to serve on jury while school is in session;[193]
7. Not required to teach school on public holidays;[194]
8. Must not inflict or cause to be inflicted corporal punishment upon any pupil;[195]
9. Must exclude from school any pupils exposed to communicable disease, or not in normal health, or whose presence in school is detrimental to the health of other children.[196]

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[185] Code, Sec. 612.
[186] Code, Sec. 618.
[187] Code, Sec. 172.
[188] Code, Sec. 171.
[189] Rules, No. 40, p. 500.
[190] Code, Sec. 182.
[191] Code, Sec. 189.
[192] Code, Sec. 229.
[193] Code, Sec. 178.
[194] Code, Sec. 170.
[195] Code, Sec. 173.
[196] Code, Sec. 189 and P. L. 1931, Chap. 84.

VIII. The Retirement of Teachers

Retirement allowances for New Jersey teachers and other members of the school system are provided for out of two systems. The first of these is the "Teachers' Retirement Fund of the State of New Jersey," commonly known as the "Teachers' Retirement Fund," which was created by Chapter 32, P. L. 1896, and by subsequent acts. The second system is the "Teachers' Pension and Annuity Fund," commonly called the "Retirement System," created by Chapter 80, P. L. 1919, and later acts. The first of these two systems consisted of two funds; one was built up out of contributions from teachers to provide an annuity to any member disabled after twenty or more years of service, and was at first optional with the teacher, but later mandatory; the second fund was contributed by the state, and provided a noncontributory pension for any teacher who taught thirty-five years. The operation of this first system became seriously involved financially, and created such unsatisfactory results that, after a two-year investigation conducted by a Pension and Retirement Fund Commission, created in 1917 by the legislature, with the assistance of pension experts and actuaries, the second system, or the "Retirement System," was created in 1919.

A. Administration of System

This system is administered by a Board of Trustees,[197] composed of seven members, namely, the Commissioner of Education, or an assistant commissioner appointed by him; the State Treasurer; one member appointed by the Governor for three years; three members elected from among the members of the retirement system for three-year terms, and distributed geographically; and one trustee, not a teacher nor an officer of the state, elected by the other trustees. This Board of Trustees has charge of the general administration of the system and is responsible for its proper operation; establishes rules and regulations for the administration and transaction of its business and for the control of the funds created; elects its officers and engages such actuarial or technical or clerical service as needed; publishes an annual report of the funds; maintains an office for administration of the system; and has power to manage the several funds and invest same and control all securities and investments made. The Attorney-General is made the legal adviser of the Board of Trustees; the Treasurer of the State is custodian of all funds; and the State Department of Insurance has the right to supervise the various funds of the system.[198]

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[197] Code, Sec. 546.

B. Membership in the Retirement System

1. Membership is required of those entering teaching service in New Jersey after Sept. 1, 1919. (New Entrants.)
2. All teachers employed in New Jersey before Sept. 1, 1919, not members of the Teachers' Retirement Fund (old system), who apply for membership before Sept. 1, 1920. (Present Entrants.)
3. All teachers who became members of Teachers' Retirement Fund (old system) through appointment as teachers since Jan. 1, 1908, who apply for membership before Sept. 1, 1920. (Present Entrants.)
4. All teachers in service Sept. 1, 1919, who became members of Teachers' Retirement Fund (old system) before Jan. 1, 1908, and who make application before Sept. 1, 1920, for membership. (Present Entrants.)
5. All teachers not in above classes who, within one year after appointment or after passage of act, make application for membership.[199] (Present Entrants.)
6.

> Subject to the same provisions as applied to teachers, any janitor, assistant janitor, janitress, engineer, firemen or any janitorial employees of a board of education of any school district, or of any public school, high school, normal school, model school, training school, vocational school, truant reformatory school, parental school within the state.[200].

Under the Retirement Law, for the purposes of membership, any person is classified as a "teacher" who is a

> * * * regular teacher, special teacher, helping teacher, teacher-clerk, principal, vice-principal, supervisor, supervising principal, director, superin-

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[198] Code, Sec. 547 (1).

[199] Code, Sec. 540.

[200] Code, Sec. 538 (8).

> tendent, city superintendent, assistant city superintendent, county superintendent, state commissioner or assistant commissioner of education and other member of the teaching or professional staff of any class, public school, high school, normal school, model school, training school, vocational school, truant reformatory school or parental school, and of any and all classes or schools within the State of New Jersey conducted under the order and superintendence, and wholly or partly at the expense of the State Board of Education, of a duly elected or appointed board of education, board of school directors or board of trustees of the state or of any school district or normal school district thereof, and any such person under contract to perform one or more of these functions.[201]

The law does not include substitute teachers or any but full-time teachers.

The one term in the above list which has needed further definition is that of "teacher-clerk." The New Jersey Department of Public Instruction regards the following as the official interpretation:

> The trustees of the Teachers' Pension and Annuity Fund have adopted a definition for a "teacher-clerk" as one who holds a valid New Jersey teacher's certificate and who does the work of a teacher as defined in the Law or does assisting work under the direction of a superintendent of schools, or an educational administrative or supervisory officer of the board of education and whose principal duties are a part of the instructional program of the school system.[202]

C. Conditions Under Which a Member Forfeits Membership[203]

1. Absence from service continuously without pay for over two years.
2. Rendering less than two years' service in any five-year period after last becoming a member.
3. By withdrawing his accumulated deductions.
4. Upon death.

D. Service Creditable to Members

1. Present entrants—not over ten years outside of New Jersey, all service in New Jersey, the total prior service not to exceed 35 years.[204]

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[201] Code, Sec. 528.

[202] Letter, Assistant Commissioner C. J. Strahan, May 27, 1932.

[203] Code, Sec. 540 (7).

[204] Code, Sec. 541 (5).

2. New entrants—not over 10 years for service in or out of New Jersey prior to becoming a member.[205]

E. The Duties of Members of the Retirement System

1. Present entrants to file application for membership[206] and to file detailed statement of all prior service.[207]
2. New entrants to file detailed statement of all prior service.[206]

F. The Conditions for Retirement, and the Amount Due[208]

1. Retirement on age.
    - (a) At age of 62 years, upon member's request or on request of employer.
        - (1) Retirement allowance for present entrant to consist of:
            - (I) An annuity representing the actuarial equivalent of his accumulated deductions at retirement.
            - (II) A pension of 1/140 of average salary for last five years multiplied by number of years of service during membership.
            - (III) A pension of 1/170 of average salary for last five years multiplied by number of years of prior service.
            - (IV) An additional pension, if any, due from Teachers' Retirement Fund (old system) before 1919.
        - (2) Retirement allowance for new entrant to consist of:
            - (I) An annuity representing the actuarial equivalent of his accumulated deductions at retirement.
            - (II) A pension of 1/140 of average salary for last five years multiplied by number of years of total service.
    - (b) Any present entrant, not under tenure of service, who becomes a member before Nov. 1, 1919, and credited

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[205] Code, Sec. 541 (6).

[206] Code, Sec. 540 (2).

[207] Code, Sec. 541 (1).

[208] Code, Sec. 542.

with 35 or more years of prior service, who loses position before attaining age of 62 years, to be retired on total retirement allowance of one-half his average salary.

(c) Any present entrant, irrespective of age, who so desires, and who has 35 years of service as teacher to his credit, the last 25 years in New Jersey, may retire before the age of 62 years, at allowance of not over one-seventieth average salary for last five years for each year of service, beside any pension due from Teachers' Retirement Fund (old system).

(d) Every member required to be retired after reaching age of 70. No person with 20 years of service and 62 years of age to receive less than $400 per year.

2. Retirement on disability.

Upon application by employer or himself or some one acting in his behalf, if under age of 62 years, upon proper physician's certificate, and after 10 years of service in New Jersey, and if a new entrant, if a member of the retirement system for 10 years. Retirement allowance to consist of:

(a) An annuity representing the actuarial equivalent of his accumulated deductions at retirement.

(b) A pension which together with this annuity will be sufficient to produce retirement allowance of 1/70 of average salary for last five years, multiplied by number of years of total service, but not less than $300 per year, or 30% of average salary, or over 9/10 of retirement allowance at 62 years.

There are a number of options as to form of receiving benefits, which will not be presented in this study.

If a teacher withdraws from service, or ceases to be a teacher for any cause but death, he is paid the accumulated deductions standing to his credit.[209]

G. Miscellaneous Provisions

1. The right of a teacher to a pension or annuity, and to return of contributions, and the various funds created under the

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[209] Code, Sec. 542 (11).

retirement system, are exempt from state or municipal tax, and not subject to attachment or other process.[210]

2. Any member of the retirement system, if taking a position in any department of the state, shall be entitled to membership in the State Employees' Retirement System. Similarly, any member of another retirement system partly or wholly operated by the state may transfer to the Teachers' Retirement System.[211]

H. Duties of Employers—Boards of Education, etc.[212]

1. Keep such records and furnish such information as board of trustees of Retirement System may require.
2. Inform any teacher when elected of duties and obligations related to Retirement System.
3. Notify board of trustees of Retirement System of appointment of teachers within ten days after appointment.
4. Deduct from teacher's salary such proportion as certified by trustees of Retirement System, and send statement and deductions to State Treasurer, and duplicate of statement to trustees of Retirement System.

I. Obligation Assumed by State

The state is under obligation to pay an annual contribution to provide for the pension funds of both present entrants and new entrants.[213]

J. Decisions of the Courts Relative to Teacher Retirement

1. The Retirement Law, which requires deductions to be made from teachers' salaries does not result in authorizing the taking of private property without due process of law, and is not, therefore, unconstitutional.

> Deductions from the monthly salaries of persons holding positions under the school law authorized by P. L. 1907, p. 371, § 219, to form the Teachers' Retirement Fund, do not constitute the taking of property without due process of law; the salary to be paid being the net amount, and not the gross amounts in computing such deduction.[214]

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[210] Code, Sec. 547 (2).

[211] Code, Secs. 554–555.

[212] Code, Sec. 545.

[213] Code, Sec. 544 (10 and 15).

[214] Allen v. Board of Education of City of Passaic (N. J. Sup.), 79 A 101.

2. The requirement that every new entrant, after a certain date, join the Retirement System is not a violation of the contract made between board and teacher, which does not specify such requirement, and is not a law which violates the obligation of contracts.

P. L. 1907, p. 374, § 221, par. 4, providing that any person appointed as a school teacher on or after January 1, 1908, shall become a member of the Teachers' Retirement Fund by virtue of such appointment, became a part of the contract entered into by a person accepting after such date any position designated in the act * * * by the mere fact of acceptance, and authorizes the deduction and retention for the Teachers' Retirement Fund of the percentage prescribed by the act from the stated salary of the incumbent of such position, under § 219, authorizing deduction from the monthly salaries of members of the fund of certain amounts.[214]

3. The Retirement Law is not special and class legislation and not, therefore, unconstitutional.

Where all objects which can constitutionally be included in a class are by legislation recognized by inclusion therein, such legislation will be general in the constitutional sense, and P. L. 1907, p. 365, art. 25, supplementary to the school law creating and providing for the Teachers' Retirement Fund, is not a private, local or special law, violative of Const., art. 4, § 7, par. 11, prohibiting the passage of such laws in certain cases, because for constitutional reasons it did not compel teachers whose contracts antedated the enactment of the supplement to become members of the fund, but only those whose contracts were made after it became effective.[214]

4. Deductions from teachers' salaries for the Retirement Fund are not essentially taxes, and hence unconstitutional, as being special in application to certain classes only.

The retention for the Teachers' Retirement Fund of the percentages of salaries of persons holding positions under the school law authorized by P. L. 1907, p. 371, § 219, is not an exercise of the taxing power of the state.[214]

5. A teacher's retirement law may be considered as making the system of free schools ''thorough and efficient,'' as is required by the constitution of school legislation.

The creation of this fund was an important public measure, which may well be considered as tending to make the system of free schools

> established by the act both thorough and effective by rendering the position of teacher a more desirable one because of the advantages arising out of the fund. It was a public scheme designed for the betterment of a branch of the service. It was offered to persons seeking and desirous of becoming teachers, who were at liberty, at their option to accept such positions, subject to the terms of the statute, or to refuse them. If they did accept, then the provisions of the act became by such acceptance binding upon them.[214]

6. Consolidation of districts does not affect a teacher's right to a pension.

> The legislative intent in P. L. 1912, p. 89, was to pension teachers who had served for 20 years in the territory to be charged with payment of the pension, and the consolidation of districts * * * did not destroy the continuity of a teacher's employment and service so as to deprive him of the right to a pension.[215]

IX. SUMMARY

Teachers, supervisors, and principals must meet certain legal qualifications in order to be employed in the public schools of the state. These qualifications include certification and citizenship, but not religious test. They must be employed either under written contract with their boards or under rules and regulation of those bodies. They receive permanent tenure after three consecutive calendar years of service in the same district, and are thereby protected from demotion, reduction in salary, and dismissal, except after hearing by the board upon certain legal charges preferred in writing. In case, however, a teacher does not hold a proper legal certificate in full force, or in case a board for purposes of economy or because of natural diminution of the number of pupils, decides to abolish a position, such employees may be dismissed without hearing or charges. The teacher, on the other hand, before resigning her position, either when under contract or under tenure, must give the employing board legal notice thereof.

While the law specifies many of the duties and privileges of teachers, supervisors, and principals, it leaves to the employing board the determination by its rules and regulations of many of these conditions of employment.

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[215] Pearce v. Board, 89 A. 1026, 85 N. J. L. 520.

A retirement system supported by contributions from the state, from the school districts, and from teachers and other employees, is available to teachers, supervisors, and principals. For such of these groups as were employed in the public schools before September 1, 1919, membership has been optional. For those entering service after that date, it is required.

The courts have ruled that both the provisions of the tenure law and those of the retirement law were enacted, not for the especial benefit of the employees, but for the improvement of the service and of the standards of the public school system.

CHAPTER XI

THE LEGAL STATUS OF PERSONNEL, OTHER THAN TEACHERS, SUPERVISORS, AND PRINCIPALS

I. Definitions, General Provisions, and Principles

A. Dictinction Between Terms

In the discussion of personnel it is necessary to distinguish between at least three types of situation or activity, in order to understand clearly certain legal implications. These types are those associated with the terms "office," "position," and "employment." The following definitions of these terms will suggest certain distinctions to be raised:

> An office is a place in a governmental system created or recognized by the law of the state which either directly or by delegated authority assigns to the incumbent thereof the continuous performance of certain permanent public duties.
>
> A position is analogous to an office, in that the duties that pertain to it are permanent and certain, and it differs from an office in that its duties may be non-governmental, and not assigned to it by public law.
>
> An employment differs from both an office and a position, in that its duties, which are non-governmental, are neither certain nor permanent.[1]

From these definitions it seems certain that such persons as the county superintendent of schools, the city superintendent of schools, the secretary or district clerk of the board of education, the custodian of school moneys, the member of the board of education, or the business manager may be said to hold an office, since 1. they represent places in a governmental system, 2. they are created and recognized by the state law, and they are assigned either by law or by the delegated authority of the state represented by the State Board of Education, or by the local board of education, the continuous performance of certain permanent public duties.

By similar reasoning, an assistant city superintendent, a teacher, a school principal, a director of recreation, or a supervisor of buildings may be said to hold a position, since their duties are non-governmental, are permanent and certain, and are not assigned by law.

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[1] Fredericks v. Board of Health of Town of West Hoboken, 82 A. 528.

Likewise, such persons as janitors, carpenters, painters, clerks, stenographers, and architects may be said to hold employments, since their duties, which are non-governmental, are neither certain nor permanent, under the law.

In the remaining portion of Section I of this chapter will be found a discussion of a number of laws which pertain to school personnel generally, with such limitations or exceptions as are noted in each.

B. Prohibition of Religious Test

One general provision concerning qualification for any type of service in a school system is that there shall be no religious test of any kind. This covers

> * * * any employee of any board of education, or for any position in any way connected with any school conducted wholly or partly with any state funds.[2]

Furthermore, this law prohibits the making of any inquiry on this point by anyone who is in the service of the public school system or of any institution sharing in state funds.

C. The Civil Service Act

The Civil Service Act, first enacted in 1908, has been made applicable to employments under the state not specifically exempted, and, in such municipalities as vote to accept the provisions of the act, is likewise made to cover such offices, positions, or employments as are not excepted.[3] Since only one school district, that of the city of Newark, has accepted the provisions of the act, it is actually applicable, so far as this study is concerned, only to the legally designated positions in the school system controlled directly by the state, and to certain positions or employments in the school system of the city of Newark.

The Civil Service Act divides the positions and employments in the state or in any school district accepting its provisions into the classified and the unclassified service. The unclassified service is not subject to the provisions of the act, and includes, under the earlier acts and under the supplement of 1930,[4] so far as concerns the school system, the following positions:

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[2] Code, Secs. 639–641.

[3] Code, Secs. 386–387.

1. all officers elected by popular vote;
2. all heads of departments of the state government and members of commissions and boards thereof;
3. the deputy or deputies to each department head in the state government, when the law provides for such a deputy to act generally for the department head in case of the latter's absence or disability;
4. one clerk or secretary and one confidential employee or agent to each principal executive officer and each state department head, or State Board or commission;
5. superintendents or directors of state institutions;
6. teachers in Normal Schools and state institutions, when certified teachers are employed under the supervision of and qualified by the State Department of Education and other institutions maintained wholly or in part by the state;
7. county superintendents;
8. all members and business managers of boards of education;
9. all superintendents, teachers, and instructors in the public schools;
10. students in educational institutions who are employed less than half time.

The classified service includes all persons in the paid service of the state or of school districts adopting the provisions of the act, not included in the unclassified service. The act of 1930, to which reference has just been made, established a new method for classifying the positions in the classified service, and the requirements for entrance to each; provided for new types of tests to establish fitness; set up a provision requiring salary schedules, efficiency ratings, and for ''working tests'' or probationary periods of service before becoming eligible to regular employment. It likewise established rules for leave of absence, sick leave, vacations, removals, transfers, and promotions.

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[4] P. L. 1930, Chap. 176.

A further provision of the Civil Service Act requires that from among those eligible for appointment, preference shall be given to veterans of the military service of the state or of the United States; and the Disabled War Veterans' Act of 1922 further requires that disabled veterans or nurses from the World War, who shall otherwise qualify, shall be placed at the top of the eligible list, and that in case of reduction in the number of employees for legal reasons, preference in retention shall be given to such veterans.[5]

It is evident that the provisions of the Civil Service Act, as given above, include a large number of persons in the service of the Department of Public Instruction and in state educational institutions or state-aided institutions. Such employees as inspectors; clerks, secretaries and stenographers (except those specifically exempted); janitorial employees and engineers; chauffeurs; mechanics and laborers; and other employees not specifically exempted would be under the provisions of the act.

The Civil Service Act performs two functions. First, it provides for the setting up of qualifications for positions, generally, based upon competitive examination, and attempts to select by these means those best qualified. Second, it aims to protect the person employed, by providing that no person in the classified service may be discharged, removed, or reduced in pay or position because of religious or political opinions or affiliations; and that no person, except one of the unskilled labor class, in the classified service, shall be removed, discharged, or reduced in pay or position except after due written notice, opportunity to make written answer thereto, and until approved by the order of the Civil Service Commission. Such a person may appeal to the Civil Service Commission for an investigation of the charges against him and for a hearing.

Several decisions relative to the Civil Service Law are important in interpreting its terms and meaning.

1. Its inclusion of school districts does not make it unconstitutional:

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[5] P. L. 1922, Chap. 52, and P. L. 1929, Chap. 349.

The act (Pamph. L. 1911, p. 727) extending the provisions of the Civil Service Law to school districts does not offend against article 4, section 7, paragraph 4 or paragraph 11 of the state constitution.[6]

2.

The Civil Service Act applies only to those offices the terms of which are not fixed by law.[7]

3.

The application of the Civil Service Act must be limited to the protection of officers *de jure,* and cannot be extended to keep in office *de facto* officers.[8]

4.

The Civil Service Law does not prevent the discharge of an incompetent employee or one guilty of official misconduct upon charges made after a hearing.[9]

D. The Veterans' Tenure Act.

Under the provisions of this act, special protection is given to honorably discharged veterans of United States military or naval service who have served in any war of the United States, or in the New Jersey State Militia during the period of the World War, and who hold situations of certain types. It is of especial interest in this study that the act includes within its provisions persons holding positions under the government of the state, or of any county, or any person employed by a school board or board of education. It includes those persons who are appointed to positions whose term of office is not fixed by law, and who receive a salary from the state, county, etc., or school district. The act clearly provides that no such person

> * * * shall be removed from such position or office except for good cause shown after a fair and impartial hearing, but such soldier, etc. * * * shall hold his position or office during good behavior, and shall not be removed for political reasons.[10]

Such a veteran, however, waives his statutory protection when he accepts an appointment for a fixed term, such as one year, or two years, and he may be discharged at the end of such a term without the customary notice and hearing. One of the important decisions on this point, Hardy v. Orange,[11] did not concern a school employee. The case of Fischler v. Union Township applied this principle specifically to employees of school districts. This decision held that if a veteran serves under a fixed term appointment in a school position, he may be dropped at the end of that term without charges or a hearing. If employed for an indefinite term, he is protected by the act:

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[6] Newark v. Civil Service Commission, 98 N. J. L. 417.

[7] Browne v. Hagen, 91 N. J. L. 544, 104 A. 207, reversing judgment 90 N. J. L. 423, 100 A. 857.

[8] Salter v. Burk, 83 N. J. L. 152, 83 A. 973.

[9] Devlin v. McDermott (N. J. Err. & App.), 86 A. 500.

[10] P. L. 1929, Chap. 29.

> Since the appellant was serving under an indefinite employment when the act became effective and has not since that time waived his rights under it, he is protected by the act and cannot be removed except in accordance with its provisions.[12]

When an employee accepts voluntarily an appointment for a definite term, it is held that his term is fixed by law within the meaning of the statute, since the board of education is empowered by law to fix the terms of officers or employees.[13]

The protection against dismissal, reduction of pay, or other demotion given by the Civil Service Act and by the Veterans' Tenure Act is of no avail in case the employing board, in good faith and for reasons of economy and good management, decides to abolish a position or reduce the number of its employees:

> Where a municipal corporation determines in good faith to reduce the number of its employees, the employees are not entitled to notice and opportunity to be heard as a condition precedent to their removal; neither the civil service act, nor the veteran act, nor the board of works tenure of office act protecting them from such removal.[14]
>
> The abolition of an office or position, held by one of the favored class designated herein [veterans], does not violate the provisions hereof, if such action is taken in good faith and for the betterment of the public service.[15]
>
> It is quite apparent from the many decisions and authorities on the subject that whenever bona fide reasons exist, such as economy in the public interest, for the abolition of an office and the transfer of its duties

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[11] Hardy v. Orange, 61 N. J. L. 623.

[12] Fischler v. Board of Education of Union Township, Union Co. (In *MSS.*), decision of Com. of Ed., May 7, 1930, affirmed by St. Bd.

[13] Code, Secs. 64, 127 (II).

[14] Colgarry v. Board, 85 N. J. L. 583, 89 A. 789; Cahill v. West Hoboken, 90 N. J. L. 398, 101 A. 417; Anderson v. Weehawken, 97 N. J. L. 371; Sutherland v. Board of Street and Water Commissioners of Jersey City, 61 N. J. L. 436.

[15] Harker v. Bayonne, 85 N. J. L. 176, 89 A. 53.

to another official, such office may be abolished even though the incumbent be protected by a Tenure of Service statute.[16]

It is important to note, however, that a board of education or other body cannot abolish an office required by law, but only those which the board itself, in accordance with authority conferred by law, may create:

> Whenever for economical reasons arising from governmental policy it may be thought wise to extinguish the office or position, the power which created can annul it. It is a matter of course that the exertion of the power to disestablish it must be bona fide, for it is manifest that a formal act purporting to abolish such an office or employee, while the office or position practically still remains in existence, such a subterfuge would be of no avail.[17]

When one enjoying the benefits of such a tenure of office act as the Civil Service Act or the Veterans' Tenure Act, and appointed for a definite term, is about to be dismissed by the authority employing him during his term, or when any such person serving under an indeterminate appointment, is about to be dismissed, he is entitled to have a notice and a hearing, unless, as was just stated, the position is abolished in good faith. If the employing board fails to give such person a notice and hearing, its action in discharging him is void:

> Where a hearing before removal of the city official is given by statute, and the body charged with giving it has acted without it or refused it, the proceedings will be set aside.[18]

E. The Workmen's Compensation Act

In New Jersey, the Workmen's Compensation Act applies to

> * * * every employee who shall be in the employ of the State, county, municipality or any board or commission, or any other governing body, including boards of education, within this State. * * * [19]

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[16] Gordon v. Jefferson Township Board of Education, S. L. D., p. 169, decision of Com. of Ed., July, 1923, affirmed by St. Bd., Oct., 1923. Equivalent decisions in Kuyl v. Board of Education of City of Paterson, S. L. D., p. 182, decision of Com. of Ed., Jan. 7, 1925; also in Theckston v. Board of Education, Gloucester City, S. L. D., p. 104, decision of Com. of Ed., Oct. 17, 1927.

[17] Evans v. Board of Chosen Freeholders of Hudson Co., 53 N. J. L. 587.

[18] Bowlby v. Dover, 68 N. J. L. (39 Vr.) 97, 52 A. 289; 64 N. J. L. (35 Vr.) 184, 44 A. 844. Markley v. Cape May Point, 55 N. J. L. (26 Vr.) 104, 25 A. 259.

[19] Code, Sec. 643 (P. L. 1913, Chap. 145).

An exception to this provision, however, exists in the case of persons holding elective offices.[19]

By the provisions of this act an employee is entitled to compensation for accident or injury, when the personal injury is caused by an accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause. In such case, provided the employee himself was not wilfully negligent at the time of receiving the injury, the employee shall receive compensation from his employer. The question of negligence becomes a case for the jury.[20]

Neither the state nor any of its sub-divisions, including school districts, is required to carry liability insurance to cover its liability under the Workmen's Compensation Act.[21]

II. The Public School Personnel in the County

In New Jersey, the county is not generally recognized either by law, by decisions, or by common consent, as a fundamental unit of school organization and control. The prevailing unit is the local school district. However, the county is assigned as an intermediate unit between the local district and the state, certain administrative and supervisory functions, and in one or two instances may become a unit of control. The important officials in such county administrative and supervisory work, aside from the county vocational board, if any, are the county superintendent of schools, the helping teacher, and, in some counties, the county supervisor of child study, the county medical inspector, and the county attendance officer.

A. The County Superintendent of Schools

Each county has a county superintendent of schools, who is appointed by the Commissioner of Education, with the advice and consent of the State Board of Education. His term is three years from the date of his appointment. In the matter of qualifications, the School Law specifies that he is to be "a suitable person,'' that he shall have been a resident of the state for at least three years immediately preceding his appointment, and that he must hold the highest teacher's certificate issued in the state.[22] The salary provided is $5,000 per year,[23] and he is given also an expense allowance up to $900 per year, payable quarterly, to meet the actual expenses incurred in performing his official duties.[24] His office quarters are to be provided by the Board of Chosen Freeholders of the county at the county seat,[25] and the same body is required to provide an appropriation for clerical assistants in his office.[26] He may legally serve until the age of 70 years, when he is required by law to be retired from service.[27]

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[20] P. L. 1911, Chap. 95.

[21] P. L. 1917, Chap. 178, as amended P. L. 1921, Chap. 272.

The functions of the County Superintendent, as prescribed by School Law, or by the Rules and Regulations of the State Board of Education, are as follows:

1. General functions.
    - (a) Select and appoint the clerical assistants in his office.[28]
    - (b) Act as member and chairman of the County Board of Examiners, if any, appoint other members, fill vacancies, and call meetings.[29]
    - (c) Serve as member of county vocational board.[30]
    - (d) See that decisions of Commissioner of Education and State Board are carried out, or report to Commissioner of Education, in case they are not obeyed.[31]
2. Functions in relation to school boards.
    - (a) Must meet with each board under his jurisdiction twice annually.[32]
    - (b) Required to advise with and counsel boards in relation to their duties, especially concerning the construction, heating, ventilating, and lighting of school houses.[33]
    - (c) Appoints members of school board when a new Article VII district is created; or for any district under his supervision when the voters fail to elect such mem-

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[22] Code, Sec. 33.
[23] Code, Sec. 34.
[24] Code, Sec. 35.
[25] Code, Sec. 40.
[26] Code, Sec. 41.
[27] Code, Sec. 542 (2).
[28] Code, Sec. 41.
[29] Code, Sec. 43.
[30] Code, Sec. 434.
[31] Rules, No. 64, p. 506.
[32] Rules, No. 36, p. 500.
[33] Code, Sec. 36.

bers at the regular time,[34] or when vacancies are so many as to make impossible the securing of a majority of the full board.[35]

Appoints 9 board members in a new school district when no persons have resided in the district 3 years.[36]

(d) Calls together in semi-annual convention, the school boards under his supervision.[37]

3. Financial functions.

(a) Apportions on or before April 1 annually to the custodians of school moneys of all local school districts, the State School Tax, the Railroad Tax, and the Interest of the Surplus Revenue, on the bases of teacher quotas, transportation of pupils, etc., and issues orders on the county collector for the amounts apportioned.[38]

> If a board of education has furnished transportation without his [County Superintendent's] knowledge, or consent, and upon examination into the cost he finds that it is excessive he may refuse to apportion moneys because of the excessive cost or because of other statutory reasons, but it follows that he cannot refuse to apportion the moneys on any other grounds. He cannot refuse to apportion moneys because of a non-compliance with a rule of the State Board of Education which requires information to be given him on these points by September 1st of the school year.[39]

(b) Apportions annually to the county collector the amount of salary and traveling expenses for the helping teachers, county supervisor of child study, county medical inspector, and county attendance officer, and draws orders on county collector for the amounts due such persons, and for the expenses of the county board of examiners.[40]

(c) Orders the custodian of school moneys of a school district, when approved by the Commissioner of Education, to withhold moneys received from the County Collector, from the local school board, for neglect or refusal of board or of its officers, to perform duties required by law or by rules and regulations of State Board, or for failure to provide adequate school facilities and accommodations.[41]

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[34] Code, Sec. 36.

[35] Rules, No. 72, p. 508.

[36] Rules, No. 73, p. 508.

[37] Code, Sec. 137.

[38] Code, Secs. 36, 272, 273, 492.

[39] Board of Education of the Township of Readington v. County Superintendent of Hunterdon Co., State School Report, 1918, p. 194, decision of Com. of Ed., Sept. 23, 1918.

[40] Code, Secs. 21, 43, 252, 517, 519.

(d) Required to withhold apportionment of Reserve Fund and State School Tax from local custodian of school moneys when the taxing district fails to pay its assessment of State School Tax.[42]

(e) Enforce penalty against school districts using state school appropriation for illegal purposes.[43]

(f) Divide balances of state school moneys in hands of local custodian of school moneys, and all assets and liabilities, between new district and the district from which the new district is created.[44]

It will be observed that these functions are largely if not entirely clerical and ministerial in their nature, requiring merely observance of the legal provisions, and not to any extent the exercise of judgment.

4. Supervisory functions.
   (a) Exercise general supervision of the schools of the county in accordance with rules and regulations of the State Board, except in city school districts having a city superintendent.[45]
   (b) Visitation of schools.
      (1) Required to visit schools in county as often as necessary,—each school at least once each year, the total number of visits to be at least twice the number of schools.[46]
      (2) Visitation activities to include—
      Inquiry into management, methods and discipline of school;
      Noting condition of schoolhouses, sites, buildings and appurtenances;

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[41] Code, Secs. 25, 196.

[42] Code, Sec. 269.

[43] Code, Sec. 334.

[44] Code, Secs. 46, 402.

[45] Code, Secs. 36, 39.

[46] Rules, No. 62, p. 506.

Examination into course of study, textbooks and school libraries;

Counseling teachers and principals as to proper studies, methods, discipline, and management.[47]

- (c) Make necessary local arrangements for county teachers' institute, preside at same, and report attendance of teachers to boards.[48]
- (d) Award diplomas to teachers who complete prescribed county course of professional reading.[49]
- (e) Certify to Commissioner of Education necessity for supervising principal in district.[50]
- (f) Establish county pedagogical library and reading course, and act as member of committee for same.[51]
- (g) Required to prepare and establish uniform course of study and standard of graduation in schools under his supervision.[52]
- (h) Required to promote patriotic observances in schools by reporting to Commissioner of Education whether law respecting display of flag and observance of Flag Day is obeyed; by recommending that in each school there shall be daily salute to flag.[53]
- (i) Required to prepare programs for Arbor Day.[54]

5. Functions with respect to pupils.
    - (a) Assign pupils remote from school in own district to school in another district, and set rate of tuition for same when boards do not agree.[55]
    - (b) Appoint scholarship students to Manual Training and Industrial School for Colored Youth at Bordentown.[56]
    - (c) Award diplomas to pupils who complete course of study in district.[57]
    - (d) Order transportation for pupils remote from school.[58]
6. Clerical and ministerial functions.

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[47] Code, Sec. 36 and Rules, No. 62, p. 506.

[48] Rules, No. 38, p. 500.

[49] Rules, No. 70, p. 507.

[50] Rules, No. 74, p. 509.

[51] Rules, No. 69, p. 507, and Code, Sec. 327.

[52] Rules, No. 68, p. 507.

[53] Rules, No. 71, p. 507.

[54] Code, Sec. 346.

[55] Code, Sec. 185.

[56] Rules, Nos. 24–28, p. 498.

[57] Rules, No. 70, p. 507.

[58] Code, Sec. 184.

- (a) Required to receive and preserve reports of school officers and teachers and turn same over to successor at end of term.[59]
- (b) Make annual report to Commissioner of Education on or before September 1.[60]
- (c) Administer oaths to teachers and officers without charge.[61]
- (d) Receive ballots and official report of all school elections in Article VII districts.[62]
- (e) Upon proper petition, appoint date for school election on consolidation of schools.[63]
- (f) Notify school boards concerned when local school elections favor school district consolidation or formation of regional boards of education.[64]
- (g) When township is divided into two or more municipalities, on petition of board of education, call special election to determine whether township shall remain as one school district, parts of it consolidate, or break up into as many school districts as new municipalities.[65]
- (h) Approve projects for transportation of pupils and receive for record copies of transportation contracts.[66]
- (i) Certify to boards of Article VII districts receipt of annual report of district clerk before local board pays balance on district clerk's salary.[67]
- (j) Distribute documents, forms, laws, etc., issued by Department of Public Instruction or State Board of Education.[68]

7. Restrictions upon County Superintendent's activities.
   - (a) Forbidden to be interested in sale to any board under his supervision of school supplies or equipment, or to promote or favor same unlawfully, under penalty of removal from office.[69]

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[59] Rules, No. 65, p. 507, and Code, Secs. 38, 169, 279.

[60] Code, Sec. 37.

[61] Code, Sec. 36.

[62] Code, Secs. 119, 142.

[63] Code, Sec. 160.

[64] P. L. 1929, Chap. 333, and P. L. 1931, Chap. 275.

[65] Code, Sec. 392.

[66] Code, Sec. 273, and Rules, No. 83, p. 511.

[67] Code, Sec. 135.

[68] Rules, No. 63, p. 506.

[69] Rules, No. 66, p. 507.

(b) Forbidden to engage in summer school work either with or without pay, except when approved by State Board.[70]

B. The Helping Teacher

The School Law provides that the Commissioner of Education, whenever he deems it advisable, may appoint a helping teacher for a county, provided the appointment is approved by the State Board. Her salary is fixed by the Commissioner of Education with the approval of the State Board, and traveling expenses up to $500 per year are allowed. Her salary and expenses are paid by order of the county superintendent of schools upon the County Treasurer, out of state school funds apportioned for that purpose by the former officer.[71] The helping teacher has purely supervisory functions. The law places no restrictions upon the number of such helping teachers to be appointed in any county. The number is governed by the amount of appropriations for salaries and expenses, and by the judgment of the Commissioner and of the State Board.

C. The County Supervisor of Child Study

Whenever a survey of conditions concerning juvenile delinquency in a county seems to justify it, the Commissioner of Education is empowered to appoint a county supervisor of child study to work under the authority of the county superintendent. The term of office is fixed at one year, and the annual salary at not more than $3,000, with an expense allowance of not over $500 per year. The salary and expense money are provided for and paid in the same manner as for the helping teachers, except that for the county supervisors of child study they are to be taken specifically out of the Railroad Tax. No definition of functions for this official is provided in the law, beyond mention of the fact that he is to be head of the department of child study for the county.[72]

D. The County Medical Inspector

A county medical inspector may be appointed only when at least $4,000 has been donated by interested persons for his salary.

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[70] Rules, No. 77, p. 510.

[71] Code, Secs. 20–22.

[72] Code, Secs. 516–517, and P. L. 1929, Chap. 313.

On such condition the Commissioner may appoint such an officer in the county concerned, provided the State Board consents. His term is one year, his duties as prescribed by the State Board, and he is allowed an expense account of $750 per year, to be paid on order of the county superintendent on the county collector, out of the Railroad Tax.[73]

E. The County Attendance Officer

When at least $900 has been donated by interested persons or subscribed to pay the salary, the Commissioner of Education is empowered to appoint, with the consent of the State Board, a county attendance officer. His term is one year, his duties as prescribed by the State Board, and he is allowed an expense account of $500 per year, to be paid on order of the county superintendent on the county collector, out of the Railroad Tax. If such an officer has been appointed and maintained in any county for three years, the Commissioner of Education on request of the county superintendent is required to appoint such an officer year after year, at a salary of not over $1,500 and an expense account of $700, both payable in the usual manner out of the Railroad Tax.[74]

III. THE PUBLIC SCHOOL PERSONNEL IN THE LOCAL SCHOOL DISTRICT

This section will contain a discussion of the administrative personnel and of certain subordinate positions and employments in the school district. It will not, however, include a discussion of the positions of supervising principal or teacher, which are discussed in the chapter on "The Legal Status of Teachers, Supervisors, and Principals,"[75] nor that of the custodian of school moneys, which is found in the chapter on "School Finance."[76]

A. The City Superintendent in the Article VI District

The School Law provides that the board of education of an Article VI district "may appoint a superintendent of schools";[77] it is evident therefore that his existence in any such district is dependent upon the will of the board, and is not mandatory. His appointment must be by a majority vote of all the members of the board,[78] for a term of not more than five years.[79] After a period of employment in a district, the superintendent may be appointed by the board either for a term not to exceed five years, or without definite term to continue at the pleasure of the board.[79] His salary is fixed by the board, and may not be reduced during his employment.[78] He is accorded by law a seat on the board of education, and the right to speak on all educational matters, but not the right to vote.[78] He must possess the same qualifications as those demanded of teachers, namely, American citizenship,[80] and proper certification,[81] and is not to be subjected to any religious test or inquiry.[82]

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[73] Code, Secs. 518–519.

[74] Code, Secs. 250–253.

[75] See Chapter X.

[76] Chapter VIII, pp. 250–251.

[77] Code, Sec. 64.

The law states that

> * * * under employment without term the superintendent may be removed by a majority vote of all the members of said board.[79]

No provision is made for his removal when he is serving under a definite term. At the end of such a term it seems evident that failure of the board to reappoint him is not removing or discharging him, but simply exercising the right to appoint whomsoever they may choose. In the absence of legal provision for the board to remove him during his term of office, it seems probable that this can be accomplished only by indictment for violation of the Crimes Act.[83] Since the law as quoted above specifically provides for his removal by the board of education when he is under employment without term, it seems probable that they cannot do so without showing cause. A 1916 decision, although it clearly antedates the 1931 act concerning removal of the city superintendent, would seem to hold also under the present law:

> A city board of education has the power, in our opinion, to employ a superintendent for a definite term, and also to discharge him, but if it does so without cause the removal is unlawful and the city superintendent has a right to have it so declared.[84]

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[78] Code, Sec. 84.

[79] P. L. 1931, Chap. 272.

[80] Code, Sec. 175.

[81] Code, Sec. 86.

[82] Code, Secs. 639–41.

[83] Code, Secs. 684–689.

[84] Carr v. Board of Education of City of Bayonne, State School Report, 1916, p. 201, decision of St. Bd., Apr. 1, 1916.

The functions of the city superintendent, as enumerated by the school law, are as follows:

1. to have supervision over the schools of the city;[85]
2. to devote himself exclusively to the duties of his office, when so required by the board of education;[86]
3. to examine into the condition and progress of the schools and to report to the board as they may direct;[86]
4. to nominate the assistant superintendent, if any, to the board for appointment;[87]
5. to suspend, with the approval of the president of the board, any assistant superintendent, principal, or teacher, and to report such suspensions to the board for final action;[88]
6. to appoint or remove clerks in his office, but their number and salaries are to be determined by the board;[86]
7. to serve as member of city board of examiners, if any;[89]
8. to make a report to the county superintendent[90] and to the Commissioner of Education before August 1;[86]
9. to have such other powers and duties as may be given him by the board of education.[86]

It has been decided in the case of Ackerman v. Board,[91] that when a superintendent acts outside of the authority bestowed upon him either by law or by the board of education, the board cannot be bound by his act.

B. The Business Manager

The board of education in any Article VI district may by a majority vote of all its members[92] appoint a business manager for the school district.[93] His salary and term of office are determined by the board,[93] except that in any school district located in a municipality having a population of more than 25,000, after three years of continuous service, he is entitled to tenure, and is not to be dismissed nor suspended nor have his pay reduced, except after notice and a hearing before the board.[94] He may be removed, presumably either during his pre-tenure service or during service under tenure, only by a majority vote of all the members of the board.[92] Since he would be responsible for many duties involving finances and much responsibility, he must be placed under bond in such amount as the board may determine, but in no case less than $2,000.[92] Like the city superintendent, he is to have a seat on the board, and is to have the right to speak on all matters relating to his department, but not the right to vote.[92] In a school district which has adopted the provisions of the Civil Service Act, he is placed in the unclassified group, which is not controlled thereby.[95]

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[85] Code, Secs. 39, 87.

[86] Code, Sec. 87.

[87] Code, Sec. 85.

[88] Code, Sec. 90.

[89] Code, Sec. 44.

[90] Code, Sec. 38.

[91] Ackerman v. Board of Education of City of Phillipsburg, State School Report, 1926, p. 78, decision of Com. of Ed., Dec. 14, 1925, affirmed by St. Bd., Apr. 3, 1926.

[92] Code, Sec. 91.

[93] Code, Sec. 64.

In a school district consisting of two or more municipalities, the board of education is authorized to employ and dismiss a business assistant, fix his duties, compensation, and term of employment.[96] It is assumed that the tenure provision for business managers in Article VI districts does not apply to the business assistant, nor any of the functions as enumerated for the latter, unless the board so specifies.

The functions of the business manager as enumerated in the law are:

1. to have charge and care of the public school buildings and of other school district property;[97]
2. to have supervision of the preparation of plans and specifications for all school building construction and repairs;[98]
3. to superintend all advertisement for bids and the letting of all contracts;[98]
4. to inspect all work done and materials or supplies furnished under contract and, subject to the approval of the board, to condemn any work and reject any materials or supplies not conforming to specifications;[98]
5. to report monthly to the board on the progress of all construction work;[98]
6. to appoint and remove clerks in his office, but the number and salaries thereof are to be determined by the board;[97]
7. to perform such other duties as are required by the board.[98]

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[94] Code, Sec. 79.

[95] Code, Sec. 387.

[96] Code, Sec. 523.

[97] Code, Sec. 92.

[98] Code, Sec. 93.

C. The Secretary or District Clerk

In Article VI districts, the person performing the principal clerical duties for the board is called the secretary, and in Article VII districts he is known as the district clerk. His appointment is mandatory, and must be made by a majority vote of all members of the board.[99] He may or may not be a member of the board.[100] The compensation provided is to be fixed by the board,[99] and his term in like manner.[100] An appointment for a term longer than one year, however, is subject to ratification or nullification by the succeeding board or boards:

> While * * * there is no question in the Commissioner's opinion but that the five-year appointment of appellant as secretary was such as to deprive ''succeeding boards of their power to appoint'' within the meaning of the above decision [McGarry v. Paterson Board of Education, S. L. D., p. 92], and hence was voidable by the incoming board, it is also his opinion that under the authority of the case of Davis vs. Boonton, * * * such an appointment not being void but voidable is capable of adoption or ratification either express or implied by the succeeding board, which will bind such board for the duration of its own official life.[101].

This officer may be removed at any time during his term of office by the board of education, but only after charges are presented and a hearing given, as a result of which a majority of the full board votes him guilty of the charges.[102] Like the business manager, in any school district located in a municipality having a population of more than 25,000, he is entitled to permanent tenure after three years of continuous service, and can then be removed only by majority vote of the full board, on the proving of charges brought in a hearing before the board.[103]

When a secretary of an Article VI district has been in public office in the board of education continuously for at least 25 years, and is 60 years of age, he may be placed on a retirement allowance by the board, which is to be not less than one-half of his final salary as secretary. Such allowance is paid out of the current funds of the district.[104]

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[99] Code, Secs. 70, 135.

[100] Code, Secs. 64, 135.

[101] Nelson v. Board of Education of City of Bayonne, State School Report, 1928, p. 58, decision of Com. of Ed., Oct. 10, 1927.

[102] Code, Sec. 71.

[104] Code, Sec. 76.

[103] Code, Sec. 79.

The secretary or district clerk must be placed under bond to be fixed by the board, and in the Article VI district the amount of the bond must not be less than $2,000.[105] Failure to file such bond for a period of time does not, however, invalidate any business cared for by this officer in the meantime:

> While the School Law does require the district clerk to file with the board of education a bond in such amount as the board shall fix and with sureties approved by such board, such statutory provision is in the Commissioner's opinion entirely for the board's protection and in no way invalidates business transacted at meetings which may have been held prior to the date of the actual filing of the bond, upon which date the clerk became a *de jure* instead of a *de facto* officer of the board.[106]

The functions of the secretary or district clerk, as given in the school law, are as follows:

1. Clerical duties:
    - (a) to record the proceedings of the board;[107]
    - (b) to record the proceedings of committees of the board (Article VI districts);[108]
    - (c) to record the proceedings of all annual and special school meetings of voters in Article VII districts;[109]
    - (d) to make an annual report to the county superintendent, (Article VII districts);[110]
    - (e) to sign all teachers' contracts;[111]
    - (f) to be custodian of all securities and official records and papers of the board (Article VI districts);[108]
    - (g) to notify all board members of all regular and special meetings of the board (Article VII districts);[109]
    - (h) to post notices of all annual and special meetings in Article VII districts;[112]
    - (i) to announce results of all annual and special meetings of voters in Article VII districts;[113]
    - (j) to act as secretary of the board of school estimate in Article VI districts;[114]

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[105] Code, Secs. 70, 135.

[106] Hulmes et al. v. Board of Education of Jefferson Township, State School Report, 1924, p. 239, decision of Com. of Ed., Nov. 19, 1923.

[107] Code, Secs. 73, 135.

[108] Code, Sec. 73.

[109] Code, Sec. 135.

[110] Code, Sec. 38.

[111] Code, Sec. 165.

[112] Code, Secs. 118, 135.

[113] Code, Sec. 119.

[114] Code, Sec. 94.

(k) to take affidavits as to correctness of claims against board (Article VII districts).[115]

2. Duties connected with finance:
   (a) to serve as general accountant of the board and preserve in his office all accounts vouchers, and contracts;[116]
   (b) to audit all accounts and demands against board (Article VI districts);[117]
   (c) to collect all tuition fees and other moneys due board, except moneys apportioned by the county superintendent or appropriated by the city and deposit same with custodian of school moneys (Article VI districts);[118]
   (d) to render a report to the board of education of all receipts and expenditures, in Article VI districts monthly and in Article VII districts at regular meetings of the board;[119]
   (e) to present an annual financial statement to the board at the close of the fiscal year;[120]
   (f) to countersign all warrants and orders drawn on the school funds;[121]
   (g) to present his record book and his financial accounts for inspection at the annual meeting of the voters, and to make a statement to the voters of the financial condition of the district (Article VII districts);[122]
   (h) to certify to the county board of taxation the amount of appropriation needed for annual expense (all districts) and for interest and principal of bonds (Article VII districts);[123]
   (i) to report annually to the Commissioner of Education statistics on the indebtedness of the school district (Article VII districts);[124]
3. Other duties:

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[115] Code, Sec. 134.
[116] Code, Secs. 75, 135.
[117] Code, Sec. 75.
[118] Code, Sec. 74.
[119] Code, Secs. 74, 83, 135.
[120] Code, Secs. 83, 135.
[121] Code, Secs. 82, 135.
[122] Code, Sec. 135.
[123] Code, Secs. 155, 665.
[124] Code, Sec. 157.

(a) to purchase school supplies and present his bill with affidavit,[125] when authorized by the board (Article VII district);

(b) to appoint and remove clerks in his office, but the number and salaries thereof to be determined by the board of education (Article VI districts).[126] In this privilege, the Secretary of an Article VI district is protected both by law and by the decision of the Commissioner against any encroachment by the board of education through its rules:

> The function of the board of education was solely the determination of the number of clerks in the Secretary's office and * * * the board possessed no power for removal or appointment within that number. * * * The Secretary was in no way restricted in his power to remove clerks in his office by any rule of the Bayonne Board of Education * * * providing that the Secretary ''shall recommend through the Superintendent the employment and dismissal of all subordinates.[127]

In the description of powers and duties of some officers of the board of education, such as the city superintendent[128] or the business manager,[129] it is frequently found that, in addition to certain enumerated functions, they are to perform any others assigned by the board. This is not the case, however, with the secretary or district clerk. The functions which this officer, especially in those additional activities where compensation is given, are not to be enlarged by the board:

> It is * * * the opinion of the Commissioner of Education that the Piscataway Township Board of Education cannot legally enlarge the statutory powers of the district clerk so as to include any function such as the supervising of the business of the schools and of buildings, grounds, equipment, janitors, etc., with the further result of enabling a board member to engage in and be compensated for duties expressly denied him by statute. There would appear, however, to be nothing illegal in a district clerk's performing such duties as are logically connected with his statutory functions, such for instance as the distribution and supervision

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[125] Code, Sec. 134.

[126] Code, Sec. 72.

[127] Rochford v. Board of Education of City of Bayonne and Joseph A. Sklenar, Secretary (In *MSS.*), decision of Com. of Ed., May 8, 1929, affirmed by St. Bd., Dec. 7, 1929.

[128] See p. 367.

[129] See p. 368.

> of school supplies, which duties are implied in his express power of purchasing school supplies.[130]

This decision expressly mentioned also the duties of truant officer as being incapable of being assumed legally by the district clerk.

D. The Assistant Superintendent of Schools

The assistant superintendent of schools in the Article VI district is recognized in the school law through the following provisions:

1. The board may appoint assistant superintendents on the nomination of the superintendent of schools, may fix their salaries, and remove them by a majority vote of all members;[131]
2. He must, like the superintendent, hold a state teacher's certificate;[132]
3. He may be suspended by the superintendent with the approval of the president of the board.[133]

E. The Assistant Secretary

The only recognition given the office of assistant secretary is that which accords him tenure protection after three years in a school district, under the same terms as the secretary.[134]

Since the law contains no specific provision for the removal of an assistant secretary under contract, it is probable that he would be removable only at the end of a contract period. It has likewise been ruled that while his office may be abolished by the board for good reasons while he is under contract, this does not relieve the board of responsibility for his salary during the contract period:

> It is * * * the Commissioner's opinion that a contract such as that between appellant and the board of education [as assistant secretary under an implied contract for one year] continued to be a binding obligation upon the latter regardless of the abolition of the position [since the] contract had not contained in itself a provision for its own termination.[135]

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[130] Gaskill et al. v. Board of Education of Township of Piscataway, S. L. D., p. 41, decision of Com. of Ed., Jan. 7, 1927.

[131] Code, Sec. 85.

[132] Code, Sec. 86.

[133] Code, Sec. 90.

[134] Code, Sec. 79.

[135] Feeney v. Board of Education of Township of North Bergen, State School Report, 1929, p. 68, decision of Com. of Ed., Nov. 30, 1928, affirmed by St. Bd., Mar. 2, 1929.

F. The Medical Inspector and the School Nurse

It is mandatory upon the board of education of every school district in New Jersey to appoint a medical inspector, but optional to employ a school nurse. More than one inspector or nurse may be appointed.[136]

The qualifications demanded of a medical inspector are that he shall be "a competent physician." The court has ruled that this means an M.D. and that an osteopath is not competent to serve:

> Licensed osteopath, not licensed under Medicine and Surgery Act, held not qualified for position of "medical inspector" for board of education (P. L. 1913, p. 388; School Law § 229 [4 Comp. St. 1910, p. 4803], as amended by P. L. 1927, p. 787).[137]

The board of education is empowered to fix the salary and term of the medical inspector and of the nurse,[136] although the rules of the board provide that the former should be appointed for a term of at least one year and should be chosen without competition.[138] The rules likewise provide that he should be paid monthly, and the last installment of the year should be withheld until all reports required by the local board and by the State Board have been turned in.[139] Two or more districts may unite in employing a medical inspector, and in such cases should pay his salary in proportion to the number of pupils in each district.[140] The board of education is required to adopt rules for the government of both the inspector and nurse, which rules must be approved by the State Board of Education.[136] The nurse is placed under the immediate direction of the medical inspector.[136]

The functions of these two health officials are as follows:

1. The medical inspector (or the nurse, under his direction) shall examine every pupil for physical defects, and keep a record of the examinations from year to year, and deliver such records to their successors.[136]

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[136] Code, Sec. 335.

[137] Chastney v. State Board of Education, 7 N. J. Misc. Rep. 385, 145 A. 730.

[138] Rules, No. 107, p. 515.

[139] Rules, No. 109, p. 515.

[140] Rules, No. 110, p. 515.

2. One of them shall lecture before the teachers at times designated by the board of education, concerning detection of communicable disease, promotion of health, and prevention of disease.[136]
3. One of them shall recommend to the teacher or principal the exclusion of pupils from school because of evidence of departure from normal health, or because of exposure to communicable disease, or those whose presence in the classroom is detrimental to the health or cleanliness of the other pupils.[141]
4. The medical inspector shall examine and certificate all pupils or teachers who are unfit subjects for vaccination.[142]
5. The medical inspector shall have authority to examine children in the district who are physically unfit for attendance in regular classrooms, and shall examine children in special classes as often as necessary, and may co-operate with Commission for Rehabilitation of Physically Handicapped Persons or with orthopedic surgeons in this service.[143]
6. The medical inspector shall examine children applying for age and schooling (employment) certificates,[144] and for proof of age of eligibility for such certificate.[145]

The rules and regulations of the State Board of Education contain certain recommendations and also certain rules to govern the activities and relationships of the medical inspectors. These are as follows:

1. The time of inspections should be arranged to suit the convenience of the school authorities and of the inspector.[146]
2. He should be required to file a monthly report of his work with the board of education, and to sign a book kept for that purpose on each visit to a school.[147]
3. He shall use the same care and skill in examining pupils as in the case of private patients.[148]
4. He shall respond to emergency calls as quickly as possible.[149]

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[141] P. L. 1931, Chap. 84.
[142] Code, Sec. 189.
[143] Code, Sec. 194.
[144] Code, Sec. 236.
[145] Code, Sec. 234.
[146] Rules, No. 111, p. 515.
[147] Rules, No. 108, p. 515.
[148] Rules, No. 117, p. 516.
[149] Rules, No. 118, p. 516.

5. He shall inspect schools in rural districts at least twice a month; in villages and small towns, and schoolhouses having more than one room, three times a month; towns and cities at the discretion of local boards, but at least three times a week.[150]
6. He shall make preliminary examinations of each room during the first week of school, and is to complete examination of new pupils by November 1, and of all other pupils by January 1.[151]
7. Examination of heart and lungs to be made by medical inspector personally, and all other examinations by him or under his direction.[152]
8. Special examinations shall be made by him at the request of the principal or teacher.[153]
9. Medical inspector shall notify parents of physical defects interfering with normal progress of child and recommend consultation of proper medical authority.[154]
10. Medical inspector to examine regularly sanitary conditions of all school properties and keep the board of education informed thereof.[155]
11. Medical inspector to comply with rules and regulations of local board of health and the State Board of Health and notify promptly the proper authorities of all cases of contagious or infectious disease found.[156]

Whenever any medical inspector in any school district has served continuously for twenty-five years on full time, and has reached the age of seventy years, he may, upon his own request, be placed upon a retirement allowance by the board of education. Such allowance is to be not less than one-half nor more than the full final salary of the inspector, and is to be paid out of the current expense funds of the district.[157]

G. The Attendance Officer

The board of education of each district is required by law to appoint a ''suitable number of qualified persons to be designated as attendance officers,'' and to fix their compensation.[158] The board would seem to be the judges of the qualifications of any persons for such a position, and could probably make rules and regulations to cover their qualifications, terms and conditions of employment, and the performance of their duties, since that body may make such rules and regulations ''for the government and management of the public schools.''[159] However, if the board should break its own rules in the appointment of such employees as attendance officers, it will not necessarily invalidate such appointments:

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[150] Rules, No. 119, p. 516.
[151] Rules, No. 120, p. 516.
[152] Rules, No. 121, p. 517.
[153] Rules, No. 123, p. 518.
[154] Rules, No. 124, p. 518.
[155] Rules, No. 128, p. 518.
[156] Rules, No. 129, p. 519.
[157] Code, Sec. 336.

> It is * * * the Commissioner's opinion that even should the rules [of the board of education] be deemed not to have been amended and the appointment of appellants [as attendance officers] * * * made in violation of the qualifications demanded by the rules, such appointments were, nevertheless, legal since no statutory requirement as to the qualifications of attendance officers were violated by the appointments and they were sanctioned by the majority vote of the board of education at a regular meeting.[160]

If an employee, such as an attendance officer, whose term is not fixed by law, is elected at a stated annual salary, even though the term of office is not specifically named in his election, he is legally appointed for one year from the date of election, and his contract can, therefore, be terminated only by consent of both parties, or for good cause.[161]

In any city in New Jersey, attendance officers acquire tenure protection after the expiration of one year of employment, and thereafter their employment in that district is to be held ''during good behavior and efficiency.'' Furthermore, no attendance officer, whether in a city or elsewhere, is subject to dismissal or to reduction in salary except for inefficiency, conduct unbecoming an officer, or other just cause, and even in such case only after the presentation of written charges and a hearing before the board, at which the charges are found by the board to be true.[162]

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[158] Code, Sec. 246.

[159] Code, Secs. 65 A, 127 (III).

[160] Mobius and Ghesquier v. Board of Education of City of Paterson, State School Report, 1925, p. 285, decision of Com. of Ed., Jan. 7, 1925.

[161] Dooley v. Board of Education of City of Bayonne, State School Report, 1914, p. 120, decision of Com. of Ed., Dec. 1, 1914.

[162] Code, Secs. 388, 389.

The rule that tenure laws shall not protect an employee in case of abolition of the office which he holds, cannot be made to apply in the case of attendance officers, since the office is required by law to be maintained:

> In the case at hand of the Attendance Officer of the City of Clifton, the office was not abolished within the meaning of the decision, since the *office* of attendance officer remained and only the number of such officers decreased, thus leaving the Board of Education free again to increase the number at any time. Such action the court decisions do not favor as indicated by the cases cited above.[163]

It seems probable that this decision would apply equally as well to such an office as that of medical inspector.

The duties of the local attendance officer are in most respects to be such as are prescribed by the rules and regulations of the board of education, which are subject to the approval of the Commissioner of Education.[164] Certain of his functions, however, are specifically prescribed by law:

1. He is to turn over to the parent, guardian, or other custodian of the child, or to the teacher, any child between the ages of 7 and 14 years, and between 14 and 16 years, if not lawfully employed, who is away from home during school hours and is truant;[165]
2. He is to warn any child violating the attendance laws, and the parent likewise, of the consequence of such violation;[165]
3. He is to have full police power to arrest without warrant any vagrant child, habitual truant, or any child who is habitually incorrigible, or vicious, immoral, or illegally absent from school;[165]
4. It is his function, as well as that of designated representatives of the Department of Labor, to investigate and inspect all mercantile establishments coming within the provisions of the child labor law,[166] and he has the right to inspect the register of employment of minors on file in the office of any factories or of commercial and manufacturing plants.[167]

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[163] Bradley v. Board of Education of City of Clifton (In *MSS.*), decision of Com. of Ed., Jan. 3, 1923.

[164] Code, Sec. 246.

[165] Code, Sec. 247.

[166] Cum. Sup., Vol. 1, p. 1723.

[167] Cum. Sup., Vol. 2, 1673.

H. The School Janitor

It seems advisable to present a separate discussion of the school janitor and of janitorial employees owing to certain special provisions of the law concerning them, and owing to a number of important decisions which have been made concerning their employment.

1. Employment of school janitors.

Article VI boards are empowered to employ such "other * * * employees as may be needed,"[168] and Article VII boards are given authority to employ janitors, the term itself being used.[169] Both boards, by the same provisions, may fix their compensation and terms of employment. The requirements as to manner of selection are interpreted in the following:

> There is nothing in the law which requires that a majority vote of all the members of the Board of Education is required to elect a janitor. A majority of a quorum, therefore, is sufficient.[170]

Boards of education in all school districts are charged by law to

> * * * make such proper rules and regulations as may be necessary for the employment, discharge, management and control of the public school janitors employed by such board not inconsistent with the provisions of this act.[171]

It has been held by the Commissioner of Education, however,

> * * * that it was in no way intended by the law that the making of such rules and regulations should constitute a condition precedent to the validity of such appointments as a board of education might choose to make,[172]

and that such appointments as janitors were not invalidated because the board had failed in its duty to adopt such rules and regulations.

By the provisions of the Teachers' Retirement Law of 1921,

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[168] Code, Sec. 64.

[169] Code, Sec. 127 (II).

[170] Goorley v. Board of Education of Borough of Bradley Beach, State School Report, 1912, p. 130, decision of Com. of Ed.

[171] Code, Sec. 390.

[172] Huysse v. Board of Education of Borough of Wallington, State School Report, 1927, p. 92, decision of Com. of Ed., Mar. 24, 1927.

> * * * there shall also come under the provisions of the act to which this act is an amendment, for pension and annuity purposes, and subject to the same provisions as applied to teachers, any janitor, assistant janitor, janitress, engineer, firemen or any janitorial employees of a board of education of any school district, or of any public school, high school, normal school, model school, training school, vocational school, truant reformatory school, parental school within the state.[173]

2. The tenure of public school janitors.

The public school janitor is protected by a tenure act which operates similarly in most respects to those for teachers, medical inspectors, district clerks and secretaries, and attendance officers. By the terms of the janitor tenure act,

> * * * no public school janitor in any municipality or school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, except upon sworn complaint for cause, and upon a hearing had before such board.[174]

If, after proper notice of five days, a hearing is held by the board, and the janitor is found guilty of the charges, he may be discharged, dismissed, or suspended, or have his pay reduced, ''but not otherwise.''[174] At such a hearing the janitor has the right to be represented by counsel.[174]

(a) Definite and indefinite term appointments.

This protection of the tenure of a janitor has been held by the Commissioner of Education, in the important case of De Bolt v. Mount Laurel Township, to be identical in nature with that afforded by the Veterans' Tenure Act. In this case, the Commissioner, relying upon the decision of the Court of Errors and Appeals in the case of Hardy v. Orange,[175] which arose under the Veterans' Tenure Act, stated that

> The military tenure law and the public school janitors' protection act are almost identical in phraseology and both confer protection as a personal privilege, which, according to the * * * Court of Errors decision, is capable of being voluntarily relinquished or waived by definite term contracts. The sole question

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[173] Code, Sec. 538.
[174] Code, Sec. 391.
[175] Hardy v. Orange, 61 N. J. L. 623.

> to be determined in the case under consideration therefore is whether the appellant can be deemed by any agreement entered into subsequent to his original indefinite term appointment in 1921 to have waived the protection conferred upon him as a public school janitor by the law above quoted.[176]

This ruling that janitors are entitled to the protection of the tenure act only under indefinite term appointments, and not under definite term contracts into which they voluntarily entered, was re-affirmed in the case of Clayton v. Matawan Township.[177] This waiving of protection from dismissal by acceptance of a definite term contract, it should be noted, applies only to dismissal at the end of a contract period. The janitor is still protected during the period of his contract term, as is evidenced by a ruling of the Attorney-General:

> There is nothing in the statute (Chap. 44, P. L. 1911) which prohibits the execution of a contract of employment for a definite time, and the provisions as to such discharge, after hearing, for cause, in my opinion prevent a board of education from discharging a janitor without such procedure during such term. The words ''discharge or dismissal'' do not apply to the expiration of a term, and in my opinion, a board of education is not required to re-employ a janitor after the expiration of such term under the agreement.[178]

If the board employs a janitor under a definite term contract, such contract cannot be for such a term as to deprive a succeeding board of its right to make its own appointment:

> The School Janitor Law * * * enables boards of education to fix their [janitors'] terms of employment, and the Attorney-General, moreover, has ruled that the protection afforded by the School Janitors' Act in question exists only during the term for which the incumbents are appointed and thus does not survive the expiration of the term of appointment. In the

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[176] DeBolt v. Board of Education of Mount Laurel Township, State School Report, 1927, p. 114, decision of Com. of Ed., Feb. 18, 1926, reversed on other grounds by St. Bd., Nov. 6, 1926.

[177] Clayton v. Board of Education of Township of Matawan, State School Report, 1929, p. 83, decision of Com. of Ed., Feb. 25, 1929.

[178] Opinion of Edward L. Katzenbach, Attorney-General, June 13, 1924, to Asst. Com. of Ed. C. J. Strahan, *Education Bulletin,* Vol. 11, No. 2, Oct. 1924, p. 47.

> Commissioner's opinion therefore it necessarily follows that statutory protection during the term presupposes that the term be one a board of education can legally make and one moreover of legal duration. An appointment cannot be deemed of legal duration which * * * deprives a succeeding board of its appointment prerogatives.[179]

On the other hand, under the principle laid down in Davis v. Boonton,[180] in which a teacher's contract was involved, while such a contract is voidable by a succeeding board, it is also capable of ratification.

(b) Effect of abolishing a position upon tenure.

The principle which holds under other tenure laws, that such laws do not prevent a board from discharging an employee under tenure when it is necessary for reasons of economy or efficiency to abolish a position or to reduce the number of employees, holds also under the Janitors' Protection Act. This was established in the case of Theckston v. Gloucester City,[181] in which the building in which a janitor had served had been demolished, and the position of janitor ceased to exist. However, circumstances may determine whether the position was actually abolished:

> If a school building is abandoned and the pupils and teachers are transferred to and constitute the school in a new building, it is the opinion of the Commissioner that the janitor theretofore employed in the old building would have his tenure rights transferred to the new building and that such transfer would apply even though the new building accommodates a slightly larger enrollment if the janitorial duties are practically the same.[182]

In case a number of janitorial employees are employed in one building, a somewhat different principle determines when a position is abolished:

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[179] McGarry et al. v. Board of Education of Paterson, S. L. D., p. 92, decision of Com. of Ed., Dec. 7, 1925, affirmed by St. Bd., Apr. 3, 1926.

[180] Davis v. Board of Education of Town of Boonton, S. L. D., p. 141, decision of Com. of Ed., Dec. 24, 1925.

[181] Theckston v. Board of Education, Gloucester City, S. L. D., p. 104, decision of Com. of Ed., Oct. 17, 1927.

[182] Ireland v. Monroe Township, Gloucester County, Board of Education, S. L. D., p. 97, decision of Com. of Ed., Dec. 14, 1925.

> A bona fide reduction in the number of employees who together execute a job or who together perform various duties is in the opinion of the Commissioner tantamount to the good faith abolition of a definite position. Janitorial employees working together in sweeping, dusting and cleaning hold group positions. A public body employing such a group may reduce the number of such employees and thereby practically abolish the position or positions held by any one or more of them. It must necessarily be within the discretion of the board to designate those whose services are terminated by such reduction, and such discretion in the absence of proof of bad faith is effective regardless of proof as to the faithfulness or efficiency of any or all of the group employed.[183]

(c) Justifiable causes for discharging janitors.

The school law provides that a janitor may be discharged for "neglect, misbehavior or other offense."[184] This does not cover all possible causes for removal, however. An additional cause, for instance, would be an illegal appointment. Such an appointment was that in McGarry et al. v. Paterson, in which a previous board had given certain janitors a "permanent" appointment. In ruling that no board had the legal right to bind its successors by a long term appointment, the State Board upheld a later board in discharging the janitors:

> In our opinion the appointment was illegal and the Paterson Board was within its rights in discharging the Appellants on that ground.[185]

It was further decided in Evans v. Chester Township that a janitor may be discharged for inability for legal or other reasons to perform the duties of the position which he holds. In this case the board had installed a new heating plant of such a type that under state law, the one operating it must secure a license from the Department of Labor. The incumbent could not qualify for such a license and hence was unable legally, and refused, to operate the heating plant, although he held himself willing to perform the other janitorial duties. The board, therefore, discharged the janitor after bringing charges and giving a hearing. In the judgment on appeal, the Commissioner said:

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[183] Hill v. Board of Education of City of Bayonne, State School Report, 1929, p. 51, decision of Com. of Ed., July 10, 1928.

[184] Code, Sec. 391.

[185] McGarry et al. v. Board of Education of City of Paterson. See footnote [179] *supra.*

> The rule of the Board, which it had a right to make, requires that janitors shall have charge of the fires and shall see that the rooms are properly heated, and in no way limits the Board of Education to any particular system of heating and ventilating. * * * He admits that he refused to run the heating plant. He admits that he was not qualified to do so. Hence the finding of the Board that he was inefficient was based on the Appellant's own act and admission.[186]

On the basis of these findings the Commissioner found that the janitor had been legally dismissed.

(d) Transfer of janitors.

While the Janitors' Protection Act prohibits the dismissal, suspension, or reduction in pay of any janitor, except for such reasons as economy, it does not govern transfer. This has been illustrated by an important decision:

> While a Board of Education cannot dismiss a janitor who has tenure in the district or reduce his compensation without a hearing, it has control of where any janitor shall work.[187]

If such a transfer is made with the intent to abolish the position to which the janitor is transferred, this is in violation of the law:

> If it could be proved that a janitor was placed in a position which it was intended to abolish for the purpose of defeating such person's tenure rights, then *mala fides* would void such action.[188]

Whether a transfer has actually been made is sometimes a matter for legal decision, since such transfer cannot, under the law, carry with it a decrease in pay. If a school board abolishes one position for a janitor, then re-employs him in another, this is not necessarily a transfer, and the person could be given a smaller compensation:

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[186] Evans v. Board of Education of Chester Township, S. L. D., p. 101, decision of Com. of Ed., Apr. 24, 1916, affirmed by St. Bd., Oct. 7, 1916.

[187] Ireland v. Monroe Township, Gloucester Co., Board of Education. See footnote 182 *supra.*

[188] Theckston v. Board of Education, Gloucester City. See footnote 181 *supra.*

> The Appellant's rights appear to rest entirely upon whether the position of janitor held by him was abolished. If it was abolished, he could be re-employed at a less salary than he was receiving as such employment would be for another position. If the position was not abolished, he could not be dismissed nor his compensation reduced except for cause after an opportunity to be heard before the Board of Education.[188]

(e) Reduction in compensation.

If a janitor is transferred to a new position, even if the duties are less arduous, his pay cannot be reduced:

> The fact that the transfer of appellant [as janitor] from School No. 5 to School No. 16 resulted in lighter work for him to perform in no way justifies in the Commissioner's opinion a reduction in salary; * * * Neither in the Commissioner's opinion could the appellant be bound by any express or implied acceptance of the reduced salary, since such an acceptance could not prevail against the terms of the statute above referred to, by which protection as to both employment and salary during their terms is conferred upon public school janitors.[189]

(f) Appeal to the higher school tribunal.

In such appeals, new evidence as to the facts are not admissible:

> The State Board of Education has held in a number of cases * * * that the only evidence to be considered in the dismissal of teachers or janitors is that established before the board of education and upon which it reached its determination.[190]

If the board has reached a determination in good faith after a fair hearing, the higher tribunals will not interfere, unless there has been some legal error prejudicial to the rights of the one appealing. In a case involving a janitor's appeal, the State Board ruled:

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[189] Holmes v. Elizabeth Board of Education, State School Report, 1924, p. 274, decision of Com. of Ed., July 25, 1924.

[190] Schaaf v. Board of Education of Borough of Fort Lee (In *MSS.*), decision of Com. of Ed., Mar. 11, 1931.

> The record here contains ample support for the findings of the Board in the present case and the opinion of the Commissioner, in effect, so admits. That being the case and the local Board having authority to prescribe the particular statutory punishment to be inflicted, there is no ground for interfering with its decision and action unless it appears that the respondent did not have a fair trial or that the Board acted with prejudice.[191]

I. Other Employees

The local school board is empowered to employ people for a variety of positions or employments other than those named. Article VI districts may employ "other officers, agents and employees as may be needed and may fix their compensation and terms of employment."[192] They may also determine the number and compensation of clerks to be employed in the offices of the superintendent of schools, the business manager, and the secretary of the board.[193] In Article VII districts, boards are given power to employ and dismiss, in addition to the officers or employees previously mentioned, "mechanics and laborers and to fix, alter and order paid their salaries and compensation."[194] Since in the case of none of these is any tenure provision included in the law, their employment, compensation, and dismissal is dependent partly upon the rules of the board of education, and partly upon general laws governing such matters as contractual relationships, except that clerks in the offices of superintendent of schools, business managers, and secretaries of school boards are employed and discharged by those officers and not by the board.[193] This fact is illustrated by the following decision in a case involving the dismissal of the secretary to the Secretary of the Board of Education:

> In the case under consideration the position held by appellant is not one upon which the School Law confers tenure protection at any time or one upon which it authorizes the local board to confer tenure protection

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[191] Eggers v. Board of Education of City of Elizabeth, State School Report, 1927, p. 50, decision of St. Bd., Feb. 5, 1927, reversing decision of Com. of Ed., Oct. 28, 1926. See also May v. Board of Education of Township of North Bergen. State School Report, 1929, p. 81, decision of Com. of Ed., Mar. 5, 1929.

[192] Code, Sec. 64.

[193] Code, Secs. 87, 92, 72.

[194] Code, Sec. 127 (II).

> as in the case of teachers. The School Law, moreover, contains no remedy against a board of education for a breach of contract in the case of such an employee.
>
> It is, therefore, the opinion of the Commissioner of Education that he has no authority whatever to assume jurisdiction over such an action as that brought by the appellant, and that if the latter considers that she has a valid claim against the Bayonne Board of Education for breach of contract, remedy in the way of a suit for damages should be sought by her in a court of law.[195]

An opinion equivalent to the above was rendered in the case of the dismissal of a supervisor of repairs,[196] and of a foreman of laborers.[197]

If an employee has a legal contract, it is evident that the board cannot discharge such employee during the term of contract, even if the position is abolished, without remaining liable to the salary for the contract period:

> It is * * * the Commissioner's opinion that a contract such as that between appellant and the board of education [as executive secretary under an implied contract for one year] continued to be a binding obligation upon the latter regardless of the abolition of the position [since the] contract had not contained in itself a provision for its own termination.[198]

The acts of a board may cause a contract with an employee to be renewed, even if no formal action to such end has been taken:

> It is * * * a well recognized legal principle supported by many cases that a definite term contract is construed upon its expiration to be renewed for a like period and upon like terms if all the circumstances, such as the continued retention and compensation of the employee, indicate such an intention.[198]

If there has been no contract of employment for such an employee for a definite term, but only an indefinite appointment, such employee may be dropped at any time without recourse by the employee:

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[195] Nagangast v. Board of Education of City of Bayonne, State School Report, 1926, p. 75, decision of Com. of Ed., Dec. 18, 1925.

[196] Lipman v. Board of Education of City of Bayonne, State School Report, 1926, p. 76, decision of Com. of Ed., Dec. 18, 1925.

[197] Cadugan v. Board of Education of City of Bayonne, State School Report, 1926, p. 77, decision of Com. of Ed., Dec. 18, 1925.

[198] Feeney v. Board of Education of Township of North Bergen, State School Report, 1929, p. 68, decision of Com. of Ed., Nov. 30, 1928, affirmed by St. Bd., Mar. 2, 1929.

> It is the opinion of the Commissioner * * * that employments from any date ''at the rate of a certain sum per week, per month, or per year,'' are indefinite appointments and when not covered by statutory protection * * * may be terminated by employer or employee at any time and that reasons given for the termination of such employment are surplusage and have no effect upon the legality of the termination of employment.[199]

IV. SUMMARY

From the discussion of the public school personnel in the county and in the local school district as presented in this chapter, it will be evident that for the most part the various offices, positions, and employments represent, so far as the law or decisions reveal the situation, somewhat unrelated parts of a school organization. In the county, the relationships of the helping teacher, the county attendance officer, the county medical inspector, and the county supervisor of child study to the county superintendent of schools are either not defined, or else not clearly stated. There seems to be no co-ordinating authority, and no central scheme. The fact that in New Jersey the county is not recognized as an educational unit is probably partly responsible for this fact.

In the local school district it is clear that the controlling power is in almost every instance the board of education, so far as personnel is concerned. The superintendent of schools, the business manager, and the secretary of the board in the Article VI district may select the clerks in their own offices, but the fact that the board determines their number and salaries makes this privilege of less value. The city superintendent, who, it would seem, should be the centralizing and co-ordinating force in the local personnel, is merely one of two or three administrative heads, and so far as legal authority is concerned, is by no means the most important one. In the Article VII district, the supervising principal is given even less importance in the established organization.

The extent to which the personnel in the local school district is protected in tenure is a unique feature of the New Jersey system. Special statutory provisions protect principals, teachers, attendance officers, medical inspectors, secretaries of boards and district clerks (in certain districts), and janitorial employees. To these provisions may be added the Civil Service Act and the Veterans' Tenure Act or Military Tenure Act, which provide tenure for other groups of employees. The large number of decisions upon all these tenure acts is an indication of the importance which they have assumed in the relations of employers and employed. These decisions have developed a body of principles concerning the employment and tenure of employees which assume a considerable importance in the legal aspects of education in New Jersey.

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[199] Burns v. Board of Education of City of Bayonne, State School Report, 1929, p. 54, decision of Com. of Ed., July 31, 1928.

CHAPTER XII

THE LEGAL STATUS OF THE PUPIL[1]

I. Introduction

When the Constitution of the State of New Jersey was revised in 1875, it recognized definitely the fact, after a long and strenuous battle in the state, that the education of ''all the children in this state''[2] was a state responsibility. It decided definitely that the state would no longer leave wholly to private or public charity, to churches, or to conservative community sentiment the education of its children. It placed definitely and finally with the legislature the responsibility of providing ''for the maintenance and support of a thorough and efficient system of free public schools,''[2] to which its children might look for their education.

II. Admission and Assignment of Children

A. Age Limits for Admission

In the same paragraph of the constitution in which the legislature is required to provide for the support of free public schools, provision is made for the protection and conservation of the State School Fund. The clause providing for legislation concerning public schools also provides that these schools shall be ''for the instruction of all the children in this state between the ages of five and eighteen years.''[2] The Act of 1912, however, provided that ''public schools shall be free to all persons over five and under twenty years of age, and to such persons over the age of twenty years as the board of education of any school district may deem it wise to offer instruction.''[3] These two provisions, which seemed to be in conflict, were reconciled by the court as follows:

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[1] This chapter will include under the designation of ''pupils,'' the consideration of the legal relationships of ''children'' and ''minors,'' so far as concerns educational implications.

[2] Constitution, Sec. 7, par. 6.

[3] Code, Sec. 183; also P. L. 1912, Chap. 183.

> The constitution, requiring the legislature to provide for the instruction of children between the ages of five and eighteen years, does not limit the power of the legislature over free public schools; and a school law providing for the education of children between the ages of five and twenty years is not invalid.[4]

The limits of 5–18 years provided by the constitution are explained as being rather a limitation upon the use of the income of the State School Fund, than upon the ages for admission of pupils, in the case of Rutgers College v. Morgan:

> The provisions of article 4, section 7, paragraph 6, of the State Constitution is not a limitation of legislative power over the subject of free public education. It prescribes what must be done with the school fund, not what may be done at public expense out of the general funds of the State. The facilities for free public education are to be provided by the legislature within the exercise of a sound discretion, subject only to constitutional restraint which must be found in expression or clear implication.[5]

Even the lower limit of five years mentioned in the constitution may be lowered to four years by a local board of education, for the admission of children to kindergarten. Such a board

> * * * may admit to such kindergarten school or department any child over the age of four and under the age of five and shall admit to such kindergarten school or department any child over the age of five and under the age of six years who shall be a resident of the district. * * * [6]

It is evident, therefore, that the public schools of any school district must admit all children between the ages of five and twenty; that if the district maintains a kindergarten, the lower age limit is four years; that any district may raise its upper age limit above twenty years by action of its board of education; and that the state, through the schools which it supports as a part of the state school system, such as colleges or teacher training schools, is not hampered by any age limits except such as the legislature may provide, but can expend the income of the State School Fund only in behalf of children between the ages of five and eighteen years.

B. Residence as a Basis for Admission of Pupils

The mandatory provisions of the code as to admission of children include the stipulation that resident children of the school district shall be admitted to school privileges. This applies to admission to the schools generally[7] and to the public kindergartens as well.[8] The case before the school tribunals which seems best to define residence from the standpoint of school attendance is that of Towner v. Mansfield Township,[9] which appeared before the Supreme Court as Mansfield Township v. State Board. In its decision, the Supreme Court gave the following opinion:

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[4] In re Newark School Board (N. J. Sup.), 70 A. 881.
[5] Rutgers College v. Morgan, 41 Vr. 460.
[6] P. L. 1931, Chap. 273.

> By section 116 of the General School Law of 1903, as amended by Pamph. L. 1912, p. 284, by which schools of this state are to be free to all persons over five and under twenty years of age who shall be residents of a school district, a resident of this state, in a broad sense, includes any person who comes into it and remains with the intent to make it his permanent home, but this legal status is not applicable to a child, who is brought or is sent into this state, by a parent or guardian who is a non-resident. The permanent residence of the father is that of the child, until the latter is emancipated and chooses a residence of his own. * * * The duty to send children to school devolves upon those having legal control of them, such as a parent or guardian, and * * * actual place of sojourn of the child, for a long or short period, does not establish its residence within the meaning of the school law unless it is the place of residence of its parent or guardian or other person having legal control of it. A child, in law, can have no residence of its own and can only lawfully acquire one when it has been emancipated. Its residence under the School Law follows that of its parent or guardian or other person having legal control of it.[10]

This interpretation of residence was also applied to the case of a mother, a widow, who resided in one school district, but whose children boarded in another school district in which was located the high school designated for their attendance. The dispute was concerning whether the children were residents of the district in which they attended high school or of the district where their mother resided, in order to determine whether the district of the mother's residence was bound to pay for the tuition of the children. The Commissioner ruled that the residence of the mother determined the residence of the children, and that the district of her residence must pay tuition to the district maintaining the high school.[11]

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[7] Code, Sec. 183.

[8] Code, Sec. 216.

[9] Towner v. Mansfield Township Board of Education, S. L. D., p. 216, decision of Supreme Court, reversing decision of St. Bd. and Com. of Ed., whose decision was rendered Jan. 11, 1924.

[10] Mansfield Township v. State Board of Education, 101 N. J. L. 474.

C. Assignment of Children to School

The power to assign pupils to certain schools is not specifically fixed in the statutes so far as concerns resident children, but is undoubtedly given to the school boards under the provisions which authorize them to make rules and regulations "for the government and management of the public schools."[12] This is made apparent also in the decision in Edwards v. Atlantic City:

> To permit all parents to select the schools which they desire their children to attend, would be demoralizing. The regularly constituted local school authorities must, of necessity, have power to determine the grade of pupils, and the building which each shall attend; and this cannot be changed by higher authority unless discrimination or unreasonable requirements can be proven.[13]

This idea that parents have, under most circumstances, but little to say concerning the schools to which their children are to be assigned is emphasized further in the case of Topping v. Montclair. In this case the guardian of a child had bought a home and moved his residence into a certain portion of a community in order to give the child the advantage of attending a certain school which enjoyed an enviable reputation. Owing to crowded conditions in this school, however, the child was assigned to another school. The decision in part was as follows:

> The Commissioner cannot agree with appellant in his contention that property purchased with the thought that children living in it may attend a certain school deprives a board of education of the right to designate another school for such children.[14]

If any parent is not satisfied with the decision of the local board as to assignment of his children, his appeal is to the Commissioner of Education, and not to the courts:

> In a case of a controversy between a citizen and the local board of education respecting the public school to which the children of the citizen

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[11] Board of Education of Newton v. Board of Education of Branchville (In *MSS.*), decision of Com. of Ed., Sept. 26, 1930.

[12] Code, Sec. 65 A. and 127 (III).

[13] Edwards v. Board of Education of Atlantic City (In *MSS.*), decision of Com. of Ed., Mar. 23, 1923, affirmed by St. Bd., June 2, 1923.

[14] Topping v. Board of Education of Town of Montclair, State School Report, 1927, p. 103, decision of Com. of Ed., Apr. 28, 1927.

should be assigned, all remedies provided by the school law of 1903 must be exhausted by the citizen before the prerogative writs of the state are awarded to him.[15]

The question has been raised whether the child must be assigned to the nearest or most conveniently located school, in the absence of transportation provided by the board. The decision here was:

> While it is desirable where transportation is not furnished to arrange the school building districts so pupils may attend the nearest school, a board may designate another school for the attendance of pupils when the overcrowded condition in the nearer school makes it advisable in the board's discretion for such pupils to attend a school which is more remote.[16]

The board of education has likewise the power to designate for attendance by pupils a school remote from their homes, if transportation is provided by the district, provided the board has exercised a wise discretion and has not acted from unjust motive. This provision will be discussed further and illustrated in the division of this chapter relating to transportation of pupils.

As a corollary to the power to assign pupils, there is undoubtedly given to boards of education the power to transfer them within the district. So far as has been discovered, there is only one limit existing to this power, and this was brought out in the case of Citizens v. Board of Education of Harrison.[17] In this case the board transferred its high school pupils from the one formerly used to another which had previously been used as an elementary school, and transferred the pupils of the upper elementary grades to the former high school building. Against this transfer the citizens protested, partly on the ground that when the building to which the high school pupils were transferred was planned, it was understood by the voters that it was to be used exclusively for primary and grammar school purposes. When this point was followed up, however, it was found from the proceedings on file in the Department of Public Instruction that the authorization was ''a general one with no designation of the proposed school building as either a high school or a grammar school.'' The Commissioner, therefore, upheld the action of the board, partly on the ground that the law gives discretion to a board in such matters, and partly because the building was not restricted by authorization of the voters in the bonding election. From this decision it would appear that the right of a board to transfer pupils to certain buildings, or, in other words, to designate certain schools for the attendance of pupils of various grades, may be limited in case the voters in their authorization of funds for erection of the school have limited the use of the building to certain purposes.

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[15] Stockton v. Board of Education, 72 N. J. L. (43 Vr.) 80.

[16] Rafferty v. Board of Education of Township of North Hanover, State School Report, 1928, p. 63, decision of Com. of Ed., Dec. 29, 1927.

[17] Citizens of the Town of Harrison v. Board of Education of the Town of Harrison, S. L. D., p. 215, decision of Com. of Ed., Nov. 28, 1921.

D. Non-Resident Pupils

1. General provision. Aside from special provisions relative to children living remote from a school in their own district, and relative to the admission of non-resident children into high school, non-resident pupils are admitted to schools of another district under the following provisions:

> Non-residents of a school district if otherwise competent, may be admitted to the schools of such district with the consent of the board of education upon such terms as said board may prescribe; provided, that the authority to charge tuition for non-resident pupils conferred by this section shall not apply to non-resident pupils transferred to any district by an order of the county superintendent of schools.[18]

This provision, therefore, places the control of conditions of admission of all non-resident elementary pupils in the hands of the receiving local board, except in cases where the county superintendent is authorized to assign a pupil to a certain school. Any exercise of control by the local board over the admission of non-resident children is always subject to the provision that the State Board of Education may

> * * * require any district having the necessary accommodations to receive pupils from other districts at rates agreed upon or which it may fix in the event of disagreement.[19]

2. Pupils living remote from school in their own district may be allowed to attend a public school in an adjoining district

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[18] Code, Sec. 183.

[19] Code, Sec. 2 (IV).

by written consent of the county superintendent, or if the districts are not in the same county, by written consent of the county superintendents of both counties. Written copies of the consent are to be filed with the district clerk or secretary of both districts.[20]

3. Admission and assignment of non-resident pupils to high school. The question of assignment of non-resident high school pupils and of designation of high schools for such attendance was an extremely trying and difficult problem prior to the passing of a new act in 1929,[21] which is designed to remove at least the greater number of sources of difficulty heretofore encountered. Previous to the passage of this act, districts having no high school contracted with those having high schools for the tuition and attendance of their pupils. Competition resulted between the districts having high schools, and very frequently the high school district which bid the lowest received the contract. Any district which was eager to build up a large high school entered the bidding, and frequently received pupils at less than cost. Due to the bidding, the sending districts frequently changed high schools, with the result that high school accommodations provided at large expense were frequently found unnecessary, due to the transfer of pupils to other high schools. As a consequence, high school districts tended to demand contracts for a period of several years before they would increase their accommodations.[22]

In addition to this situation, another vexed problem was the limited offerings of the smaller high schools. In such districts many parents desired to send their children to high schools in larger communities in order that they might have access to a more varied program of studies, especially in commercial or vocational subjects. In a case[23] appealed to the Commissioner of Education, however, it was decided that even if the board of education desired to do so, there was no authority under the school law by which a district having an approved four-year high school could pay tuition for pupils from its district who desired to attend a high school in another district.

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[20] Code, Sec. 185.

[21] P. L. 1929, Chap. 281.

[22] Unpublished report of experts to New Jersey Commission to Survey Public Education, 1928. Section on ''Secondary Education'' by Harl R. Douglass and Preston H. Smith.

[23] Black v. Board of Education of Borough of Elmer, S. L. D., p. 260, decision of Com. of Ed., Oct. 20, 1916, affirmed by St. Bd., Oct. 6, 1917.

The 1929 act has seemed to correct both of these situations. It put a stop to the frequent changes in designation of high schools for non-resident children by the sending boards of education by providing that

> * * * the high schools throughout the State to which other districts shall send their pupils or a part thereof shall be deemed to be those high schools which at the time of the passage of this act [are] already designated by boards of education of districts lacking high school facilities as aforesaid as schools for their pupils or a portion of their pupils to attend. Such existing designation of a high school for the pupils or a portion thereof or for pupils from certain sections of a district lacking such facilities as aforesaid shall continue until the board of education thereof shall for good and sufficient reasons desire a change in such existing designation and shall secure the approval of the Commissioner of Education therefor; provided, however, that the refusal or failure of the Commissioner to approve the request for change in designation of high school by any board of education shall be subject always to a right of appeal to the State Board of Education.

This act also made it possible for a child who lived in a school district which in its high school did not maintain the particular curriculum which the child desired to pursue, to be admitted to a high school in another district where such a curriculum was provided.

A further adjustment made by this act concerned the method of determining the tuition rate. The former method was by agreement between the boards of education concerned, subject to appeal to the State Board of Education in case of disagreement.[24] This led to many disputes between districts. The new provision of the law is that the boards of education of the districts containing the high schools shall fix the rate, not to exceed the actual cost per pupil. Since this is a part of the school law, any dispute is still subject to appeal as indicated, and in several cases appeals have been carried to the higher tribunals. In one of these the sending board appealed on the ground that the school law gives the State Board of Education, and not solely the receiving board, the power to fix the tuition rate. On this point the Commissioner ruled:

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[24] Code, Secs. 186 and 2 (IV).

> Authority for the State Board of Education to fix the rate was given under the provisions of Chapter 231, P. L. 1911, whereas the authority for the local board of education to fix the rate, provided it is not in excess of the cost, is conferred by Chapter 281, P. L. 1929. The State Board still retains the right to fix tuition rates for pupils in the elementary schools, but the right to fix rates for pupils in the high school is controlled by the latest statute on that subject, namely, Chapter 281, P. L. 1929.[25]

The method of determining the tuition rate as fixed by the State Board of Education is found in the following decision:

> The actual cost per pupil is determined by adding to the operating cost of the high school, the rental charge of five per centum of the original cost of the plant and dividing that amount by the average enrollment of the school for the year. The quotient is then the ''actual cost per pupil'' without regard to the sources of revenue by which the expenses are paid.[26]

In this case, the sending boards contended that the receiving board should deduct state apportionments before dividing, but the Commissioner ruled that the sending board would then be benefiting twice by state apportionment for the same purpose, since the state apportions a certain sum to each sending district for each pupil sent to high school in another district.

In the same case, the Commissioner made it plain that the receiving board must make known to the sending boards in good time its tuition rate or bear the penalty:

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[25] Board of Education of Township of Raritan v. Board of Education of Borough of Keyport (In *MSS.*), decision of Com. of Ed., Dec. 27, 1930.

[26] The Boards of Education of the School Districts of the Borough of Alpha, and the Townships of Lopatcong and Hopatcong, in the County of Warren, v. Board of Education of Town of Phillipsburg (In *MSS.*), decision of Com. of Ed., Jan. 27, 1931.

> The statute provides "The board of education of the districts containing the high school shall determine the tuition rate." It would appear from this provision that the board should fix a definite rate which would be made known to the sending districts. The only restriction in the determination of the rate is that it "shall in no case exceed the actual cost per pupil." It is not the intention of this act that the practice of fixing a rate prior to the opening of school should be discontinued. Unless a board of education notifies sending districts prior to the opening of school of the rate of tuition or definitely states that it will charge the actual cost, it must be considered that the acceptance of the pupils is at the rate of the preceding year and that the provisions of the implied or written contract of the preceding year are re-enacted and approved.

There have already been important decisions interpreting this law. One of these applied to a case[27] in which pupils from one school district, Riverton, had been assigned previous to the passing of the law to more than one high school, namely, Palmyra and Moorestown. After the passage of the act, due partly to a desire on the part of a number of parents to send children to the same high school at Moorestown to which older members of the family had gone, and due partly to some question as to the standing of the Palmyra High School, the Riverton board of education permitted parents of members of a new ninth grade group to exercise a choice, with the result that nearly all expressed a preference for Moorestown High School. The board, thereupon, announced that it would designate that school as one for their children to attend, if the Commissioner would approve, on the ground that more than one high school had been designated previous to the passage of the act. However, the Commissioner, noting the fact that the Palmyra board of education, as a result of a survey of its high school facilities, had committed itself to a program of improvement, decided in favor of the designation of that school alone, saying:

> The law requires (Chap. 281, P. L. 1929) that the school designated for the pupils or a portion of the pupils to attend at the time

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[27] Application of the Board of Education of the Borough of Riverton to Change the High School Designation under the Provisions of Chapter 281, P. L. 1929 (In *MSS.*), decision of Com. of Ed., Sept. 21, 1929.

> of the passage of the act shall continue to be the designated school until a change of designation is approved by the Commissioner of Education. It is possible to consider that there has been a permanent designation of more than one high school only where the board of a large territorial district has designated different high schools for certain sections of the district or where a board has been sending a large percentage of pupils to more than one school. In such cases the designation of more than one school should continue. Where, however, only small numbers have been attending different schools, the latter must be considered as exceptions to the designated school; * * * If a high school building becomes overcrowded or a board of education in control fails to keep the school up to reasonable standards, such condition or failure would be sufficient grounds for the Commissioner to grant the privilege of a board to change the designation of its high school.

The manner in which this law operates to prevent sending school districts from shopping about for high school accommodations to secure the lowest tuition rates is illustrated in the following:

> It is quite possible for a receiving district to provide adequate facilities demanded by a sending district, and a failure to provide proper facilities would appear to be good cause for the approval by the Commissioner of Education of a transfer to another high school, but where the only relevant reason is the increased tuition charge which is not in excess of the cost, the district providing the facilities should be protected.[28]

4. Admission and assignment of pupils to Model Schools attached to teacher training institutions is subject to a special ruling.[29] This is accomplished on consent of the board of the school district where the pupil lives and of the board of control of the Model School, provided the pupil has completed the course of study in the district where he resides. In such cases, the tuition rate is fixed by agreement by the boards concerned.

E. Periods for Admission of Pupils

The New Jersey law fixes rather specifically the dates or periods for admission of pupils to school as beginners.[30] For children who have never attended private or public school these periods are as follows:

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[28] In Re Application for Transfer of Stafford Township Pupils from the Barnegat High School in Union Township (Ocean County), to the Tuckerton High School (In *MSS.*), decision of Com. of Ed., Aug. 21, 1930.

[29] Code, Sec. 195.

[30] Code, Sec. 192.

1. during the ten days immediately following the opening of schools for the fall term;
2. during the first five days in January;
3. during the first five days of April;
4. at no other time except by majority vote of all the members of the board.

The law in this case says "may be admitted," and this has been interpreted by the Assistant Commissioner to mean that pupils must be admitted at these periods.[31] They may be admitted at other periods only when so ruled by a majority vote of all members of the board.

F. Exclusion of Pupils

The conditions under which pupils may be admitted have been set forth, and it remains to be shown under what circumstances they may be excluded.

1. On the basis of age, a child under the age of 5 years cannot be admitted to the public schools, unless the district maintains a kindergarten, when the age of 4 years becomes a lower limit.[32] A school board has the option, however, of making the age of 5 years the lower limit for admission to kindergarten.[33] As to the upper age limits, a board may not exclude a pupil who is under the age of 20 years.[34]
2. There are a number of instances in which certain provisions of the law relating to health and sanitation may be the basis for exclusion.
    (a) Non-vaccination. The law concerning vaccination of pupils has been held to be mandatory, and pupils who have not been successfully vaccinated must be excluded. A more complete discussion of this subject is contained in a later section of this chapter.

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[31] Letter, Asst. Commissioner C. J. Strahan, Dec. 29, 1931.
[32] Code, Sec. 216.
[33] Chap. 273, P. L. 1931.
[34] Code, Sec. 183.

- (b) Communicable disease. When a pupil is a member of a household in which some person is ill with certain contagious or infectious disease, or is a member of a household exposed to such disease, he must be excluded until a certificate is secured from the proper health authority stating that danger from such disease is passed.[35]
- (c) Health or cleanliness. In case of evidence of departure from normal health of a child, the principal of a school upon recommendation of the school physician or school nurse shall exclude such child from school building, or in the absence of a physician or nurse, the teacher has power to exclude the child from the room or the principal to exclude him from the building. On recommendation of the school physician or nurse or, in their absence, the principal may exclude from school any child who has been exposed to communicable disease or whose presence in school is detrimental to the health of the other children.[36]

3. Suspension or expulsion. The teacher or principal of a school or the board of education may suspend a pupil, but only the board may expel him, or permanently exclude him. The provisions covering such cases will be discussed in a later section of this chapter.

G. When Pupils May Not be Excluded

> No child between the age of four and twenty years shall be excluded from any public school on account of his or her religion, nationality or color.[37]

This provision of the law has given rise to a number of important and interesting decisions. The earliest of these cases, and the one which established the principle in the courts as concerned color, was that of Pierce v. Union District. In this case, which was tried in 1886, a board had attempted to exclude a negro child from a public school on account of the fact that he was a negro. The decision of the court was:

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[35] Code, Sec. 189.
[36] P. L., 1931, Chap. 84.
[37] Code, Sec. 193.

> The supplement to "an act to establish a system of public instruction," approved March 23, 1881 (P. L., p. 186), makes it unlawful for school trustees to exclude children from any public school on the ground that they are of the negro race.[38]

When a child is excluded from school for such reason, the parent has the privilege of appealing directly to the courts, instead of resorting to the usual procedure through the school tribunals:

> Where a child of school age is excluded from the public schools solely on the ground of color, and it is not a question of the particular school to which he is assigned as a mere matter of convenience, it is not necessary to assert his rights in the first instance through the procedure provided by the school law but resort may be had at once to mandamus.[39]

The question has been raised before the Commissioner of Education whether segregation of white and colored children constitutes exclusion of the colored children from a public school. In the Delran township case, at least, it was determined that it did not. In this case the board directed all colored pupils in the district to attend one school, furnishing transportation where it seemed necessary, and directed all white pupils to attend another school in the district. The decision said in part:

> The Board of Education has furnished these colored children proper school facilities. It has designated the school at which they shall attend, and it has furnished them with a regularly licensed teacher. It, therefore, has acted entirely within its lawful duties and has exercised only its just powers. It does not matter that the Board has designated the Fairview School as a colored school and given it such a name.
>
> It is no discrimination under the school law for a board of education to require children to attend a given school. On the contrary, it is the duty of the board of education to make such distribution of the children in the different schools of the school district as in its judgment shall seem to best meet all the requirements of the school laws.[40]

III. ENUMERATION OF CHILDREN (SCHOOL CENSUS)

The school law in New Jersey permits, but does not require, the taking of an exact census of all children residing in any district, who are between the ages of five and eighteen years, including such other information as the local board may deem necessary.[41] Such a census, however, may not be taken more often than once in five years, nor in any year in which a United States or state census shall be taken. For this purpose the boards are authorized to appoint enumerators and fix their compensation, not to be over four cents per name.

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[38] Pierce v. Union District School Trustees, 17 Vr. 76.

[39] Raison v. Board of Education, 103 N. J. L. 547.

[40] Residents of Delran Township v. Board of Education of Delran Township, State School Report, 1920, p. 185, decision of Com. of Ed., Nov. 24, 1919.

IV. EXAMINATION AND PROMOTION OF PUPILS

The control of promotion of pupils is primarily the province of the local board of education, since the board is to make rules and regulations "for the government and management of the public schools * * * in said district,"[42] and, furthermore, since the examining power given the Commissioner is expressly limited by the statement that

> * * * nothing herein contained shall impair the right of each district to prescribe its own rules for promotion.[43]

Such rules by local boards may or may not require that pupils take examinations for promotion, and may define the scope of authority of teachers and principals in the matter. The case of DeBow v. Pequannock township illustrates this principle. The decision in this case stated that so long as the board and the principal or teachers act without prejudice,

> * * * the question of grading pupils is one that belongs wholly to the board of education acting through the principal or teachers of the schools.[44]

Sometimes the question of necessity of examination as a condition for eligibility for entrance to high school becomes an issue, as in the case of Staats v. Montgomery township:

> The State Board of Education holds that a local Board of Education has authority to prescribe its own rules for promotion. It is given that express right by statute. The Appellant [local board] was within its rights in stipulating that the boys should pass an examination and thus demonstrate their fitness to attend high school.[45]

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[41] Code, Sec. 351.

[42] Code, Secs. 65 A. and 127 (III).

[43] Code, Sec. 9 (X).

[44] DeBow v. Board of Education of Pequannock Township, State School Report, 1921, p. 313, decision of Com. of Ed., Feb. 14, 1921.

[45] Staats v. Board of Education of Montgomery Township, Somerset Co., S. L. D., p. 246, decision of St. Bd., Apr. 4, 1914, reversing decision of Com. of Ed., Feb. 20, 1914.

The ruling of the State Board in this case makes it evident that the local board could require such pupils to pass the county examination, a local examination by the teacher or principal, or an examination by the high school which they desired to enter, or all of them, so long as it prescribed it through a definite rule.

As a sign of promotion from the schools of a district, the pupils "who shall successfully complete the prescribed course of study" are to receive from the county superintendent diplomas furnished by the Commissioner of Education.[46] These are usually given to those completing the elementary school course, and are available if desired for those completing the high school course. In a certain case, where the examination by the county superintendent was required by the board for admission to high school, a pupil had failed to take this examination, owing to protracted illness. Since it was established that the pupil had done satisfactory work in his previous year, the county superintendent issued to him a diploma usually given only to those who passed the examination. The board refused to pay tuition for this pupil and an appeal was taken to the Commissioner. His ruling was that when a county superintendent issues to an eighth grade pupil of a grammar school a diploma certifying that the pupil has successfully completed the prescribed course of study, the pupil is entitled to admission to the high school where the board of education sends pupils of the district, even if the pupil for cause sufficient to the county superintendent has not taken the customary examination, and the board is responsible for the pupil's tuition in such high school.[47] This would seem to make it evident that when there has been a substantial compliance with the rules of the board respecting such promotion, the school tribunals will not permit a requirement such as the giving of an examination to prevent a pupil from having tuition paid in high school, especially where the county superintendent had satisfied himself as to the ability of the pupil to pursue a high school course successfully.

The county examination to which reference has been made is, more properly speaking, a state examination, since the Commissioner of Education is the person required to prepare it or have it prepared, and have the papers read, and the county superintendent is only his agent in the matter. Previous to 1931, these examinations were required to be given to the highest grade of each elementary school, within sixty days prior to the expiration of the term, in arithmetic, writing, spelling, English, history, and geography, except that any subject not taught in the highest elementary grade might be omitted from the examination. With the development of the intermediate school, however, the highest elementary grade in many schools was no longer the eighth. Schools varied by several weeks in the length of their terms. Some districts had semi-annual promotions, so that part of their pupils completed their course in February. And, furthermore, many districts and even counties were prone to use the results of the state eighth grade examination as a basis for promotion to high school, a practice which resulted in undue stress upon reviews. These conditions, all of which were brought to light by the report of the State School Survey Commission experts to the Commission in 1928, led to a revision of the law by the 1931 legislature, which provided[48] that requirements for examinations at specific times and in specific grades should not, thereafter, be effective. Since the law already specified[49] that the Commissioner of Education or the State Board may have examinations or tests given to pupils of any school or any grades of the public schools, to determine their thoroughness and efficiency, the provision of the 1931 act resulted practically in making this more general provision mandatory rather than optional, but left to the discretion of the Commissioner the time of examination and the grades to be examined, thus making it possible to emphasize the research value of the examinations rather than their promotional use.

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[46] Rules, p. 507, No. 70.

[47] Dunn v. Board of Education of East Millstone, State School Report, 1915, p. 53, decision of Com. of Ed., July 1, 1915.

V. HEALTH PROVISIONS CONCERNING PUPILS

Under the topic, "Exclusion of Pupils," reference has previously been made to the provisions of the law covering health of pupils in school. It will be recalled that these provisions referred to three phases of health control, namely, vaccination, communicable disease, and general health and cleanliness.

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[48] P. L. 1931, Chap. 306.

[49] Code, Sec. 9 (X).

A. Vaccination

The law states that

> A board of education may exclude from school any teacher or pupil who shall not have been successfully vaccinated or revaccinated, unless such teacher or pupil shall present a certificate signed by a regularly licensed physician that such teacher or pupil is an unfit subject for vaccination; provided, that in any district having a medical inspector appointed by the board of education the certificate herebefore provided for shall be furnished by such medical inspector.[50]

Under the vaccination law, a number of points have arisen which have been, in most cases, definitely decided by the Commissioner or the State Board.

1. Vaccination is mandatory in all school districts and not subject to the rules and regulations of the various local boards. It will be noted that the law provides that ''A board of education *may* exclude'' unvaccinated teachers or pupils. In the case of Curtis v. Newark, the Commissioner argued that

   > * * * if it gives discretionary power, then a Board of Education becomes the judge of the merits of vaccination as a preventive of smallpox, * * * a prerogative * * * vouchsafed to no other public body in the world, outside of State legislatures. On the other hand, if the statute is mandatory, then the Board of Education has no power to pass on the question of the efficacy of vaccination as a preventive of smallpox. Neither has it power to pass upon the dangers that may follow in case of its performance. * * * Plainly it is a duty that is imposed on the Board of Education by the statute, in which both public and private persons have a deep interest, namely, the protection of their bodies from an alarming disease. The clause in the statute ''may exclude from school,'' etc., taking all things into consideration in connection with health legislation, should be construed as conveying a command.[51]

   After discussing the use of the word ''may'' in a mandatory sense, the Commissioner continues:

   > To interpret the word ''may'' as only permissive, would be to render the statute ineffective and would defeat the very object to be attained, namely, the protection of the children and the community

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[50] Code, Sec. 189.

[51] Curtis v. Board of Education of City of Newark, S. L. D., p. 320, decision of Com. of Ed., Aug. 2, 1915, affirmed by St. Bd., Sept. 11, 1915.

> at large from the ravages of a loathsome disease. It is my opinion, therefore, that the statute relating to vaccination is mandatory. * * *

It is to be noted, however, that in this case the State Board of Education affirmed the decision of the Commissioner on other grounds than that the law is mandatory, and expressed no opinion on that point. So far as could be discovered, there is no decision of the Supreme Court upon the point, and it is to be assumed, therefore, that the decision of the Commissioner is binding until reversed by higher authority.

2. Exemptions from the provisions of the vaccination law. In the law, as quoted, a teacher or pupil who is properly certified to be an unfit subject for vaccination is exempt.

   The law requires that such a certificate be signed by a regularly licensed physician, except that if the district has a medical inspector, he is to sign it. Since every district is required to employ a medical inspector,[52] he is the only physician competent to issue such a certificate of physical unfitness.
3. How vaccination can be ensured where parents are unable to pay for it. The code provides that if a board of education finds that if any pupil is enrolled in public school who is found to be unvaccinated and whose parents it is established are unable to pay for vaccination, the district clerk or secretary of the board may give the pupil a permit to appear before any regularly licensed physician and to receive vaccination, the physician to be paid for such service by the municipality the sum of fifty cents.[53]
4. The vaccination law does not conflict with the compulsory attendance law. The basic decision on this point is that of Adams et al. v. Township of Berlin:

> It cannot in the opinion of the Commissioner of Education be successfully argued that an exclusion from school for failure to comply with a vaccination requirement is in conflict with the provisions of the Compulsory Education Law which requires the attendance at school of every child between the ages of 7 and 16, unless regularly and lawfully employed or unless receiving equivalent instruction elsewhere. A child excluded from school by a board of education under statutory authority for such exclusion is an excep-

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[52] Code, Sec. 335.

[53] Code, Sec. 190.

> tion to the Compulsory School Law requirements, or, in other words, is in reality outside the law and remains an exception to or outside the law until he or she has complied with the regulations which the board is legally authorized to make.[54]

5. Exclusion of pupils from school for failure to be vaccinated is not in violation of their constitutional privileges, by which the legislature is to establish a school system for all children in the state between the ages of 5 and 18 years.

   In the case just quoted, this point was also one at issue. The Commissioner said:

   > Neither, in the opinion of the Commissioner, can the statutory authority for such exclusion for failure to be vaccinated be said to be in conflict with the Constitutional provision for the establishment of a system of public schools for all the children of the state between the ages of 5 and 18 years, since the statute authorizing the exclusion for failure to be vaccinated is a justifiable exercise of police power by the Legislature in protecting the health of people.

6. The obligation or penalty for the parent whose child is excluded for non-compliance with vaccination regulations. On this point there has been no decision by school tribunals or by the courts, so far as could be discovered, but an opinion by the Attorney-General of the State of New Jersey seems to cover it thoroughly:

   > From the foregoing [Compulsory Vaccination Law, Chap. 104, P. L. 1906; Compulsory Attendance Law, Chap. 35, P. L. 1919; and Chap. 223, P. L. 1914], it would seem that a child who has been excluded from school because of failure to comply with the vaccination provision of our statute, must, nevertheless, receive equivalent instruction elsewhere in the subjects specified in the act of 1919, and that a child so failing to attend may be declared to be a juvenile disorderly person or a juvenile delinquent, and be proceeded against as such, and the parent may be adjudged to be a disorderly person and be punished accordingly, all in accordance with the provisions of the several statutes hereinabove referred to.[55]

B. Communicable Disease or Other Health Conditions

The provisions covering exclusion for communicable disease were previously cited.[56] This law requires exclusion of a pupil or teacher when he is "a member of a household," in which such disease exists, or of which a member has been exposed to contagion, and presumably this covers cases where the pupil himself is suffering from such disease.

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[54] Adams et al. v. Board of Education of Township of Berlin, S. L. D., p. 318, decision of Com. of Ed., Aug. 22, 1922, affirmed by St. Bd.

[55] Opinion of the Attorney-General, Edward L. Katzenbach, to Commissioner Logan, Mar. 3, 1927. *Education Bulletin,* Vol. XIII, No. 9, May, 1927, p. 345.

[56] Code, Sec. 189.

1. Diseases for which a pupil may be excluded.
    - (a) Smallpox, diphtheria, scarlet fever, whooping cough, yellow fever, typhus fever, cholera, measles.
    - (b) Other contagious or infectious disease as designated by the board of education.
    - (c) Aside from a child having a communicable disease, one whose condition shows "departure from normal health," or one "whose presence in school is detrimental to the health or cleanliness of the pupils in the school"[57] may be excluded.
2. Exercising the authority to exclude such children.

    If the school physician or school nurse is present in the school, they recommend the exclusion to the principal, who excludes such children from the building. If neither the physician nor the nurse is present in the building, the classroom teacher may exclude such children from the room, and the principal may exclude them from the building.[57]
3. Notice of exclusion to the parent.

    The teacher or principal excluding any child for health reasons is required to notify the parent or other person having control of the child of the reason therefor.[57]
4. Responsibility of parents or guardians.

    If the cause for exclusion is remediable, the parent or other person having control over the child is responsible for having it remedied, and failure to do so renders him liable to action as a disorderly person.[57]
5. The conditions for readmission to school.

    For persons (pupils or teachers) who have suffered from or had direct or indirect contact with communicable disease, a certificate stating that all danger of communicating such disease has passed must be secured from a medical inspector, and presented to the board of education.[56] Although no provision is made in law for readmission to school of pupils suffering from other than communicable disease, such as conditions just mentioned, it is the opinion of the Department of Public Instruction that readmission is subject to the same conditions.[58]

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[57] Chapter 84, P. L. 1931.

VI. The Control of Pupils

A. Duty of the Pupil

On the side of behavior and control, it is evident that the first duty lies with the pupils themselves. The law requires of the pupil three duties:[59]

1. that he comply with the regulations established in pursuance of law for the government of such schools;
2. that he pursue the prescribed course of study;
3. that he submit to the authority of the teacher.

Any rule of a board of education is governing upon a pupil, so long as it is not in contravention of a statute,[60] and is reasonable:[61]

> A Board of Education has the right, under the law, to make rules and regulations for the government of the school. * * * Its action, however, must be reasonable, and must not impose an undue hardship on any pupil.[62]

In the absence of rules and regulations of the board in any matter, any rule established by a superintendent, supervising principal, principal, or teacher is likewise binding upon a pupil,[63] so long as it is not contrary to statute and is reasonable, until such time as the board or other proper authority may reverse, alter, or otherwise establish a rule to the contrary.[64]

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[58] Letter, Asst. Commissioner C. J. Strahan, Dec. 29, 1931.

[59] Code, Sec. 187.

[60] Nommensen v. Hoboken Board of Education, S. L. D., p. 166, decision of Com. of Ed., Jan. 4, 1923, affirmed by St. Bd.

[61] McConnell v. Commissioners of Orange, 98 N. J. L. 642.

[62] Temple v. Board of Education of Township of Cedar Grove, S. L. D., p. 305, decision of Com. of Ed., Nov. 8, 1912.

[63] McCurran et al. v. Board of Education of City of Trenton, S. L. D., p. 275, decision of Com. of Ed., Jan. 25, 1917, affirmed by St. Bd., June 2, 1917.

[64] Gebhart v. Hopewell Township Board of Education, State School Report, 1928, p. 48, decision of Com. of Ed., Dec. 16, 1927, affirmed by St. Bd., May 5, 1928.

An example of a duty owed by a pupil under a rule of a board which was found to be reasonable occurred in the case of Temple v. Township of Cedar Grove, concerning a salute to the American flag by a pupil whose father was not a citizen:

> I think if a pupil is present at the opening exercises, it is his duty to salute the flag. It is a mark of respect that any decent man or boy would use, no matter what country he was in.[62]

In the same case, however, occurred an example of an unreasonable rule. The board, in addition to requiring the flag salute, was requiring all pupils to repeat the pledge of allegiance to the flag, and the boy was suspended for non-compliance. The Commissioner ruled that since the boy's father was not a citizen, and the son's citizenship followed that of his father during the son's minority, too much was being required:

> I think, therefore, that if the child salutes the flag, and does not repeat this pledge, that he is doing all that can reasonably be expected of him; and that a Board of Education has no right to ask a child to pledge allegiance to the flag of a country of which he is not a citizen.

B. Responsibility for Control of Pupil

Primarily, the responsibility for control of the pupil rests with the teacher. She may be acting under rules of the board, or under rules of her superiors, either superintendent, supervising principal, or principal, and may refer cases to them for decision or confirmation, but the law itself gives the teacher both a high degree of authority and a plain duty:

> A teacher shall hold every pupil accountable in school for disorderly conduct on the way to or from school, or on the playgrounds of the school, or during recess. * * * [65]

A principal or a supervising principal is, under the law, a teacher, and hence has this same position of authority, but also has further powers of control over pupils in certain relationships, such as severe punishment or exclusion from school. This has already been shown to be true in the case of exclusion under health laws, and will be illustrated further in the case of suspension of a pupil. A board of education likewise shares the responsibility, since it may provide for control of pupils under its rules and regulations, and must take the final step in certain disciplinary actions to be explained.

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[65] Code, Sec. 172.

C. Extent of Control Over Pupil

It is to be noted that by the terms of the statute just quoted the pupil is under the control of the teacher, and presumably of the school authorities generally, not only in school, but also on the way to or from school. This immediately limits the authority of the parent, as is shown by the following decision, in which it is stated that the law

> * * * gives the teacher full control of a pupil from the moment he leaves his home on his way to school until he enters it on his return from school. The law substitutes the teacher in place of the parent, and the parent, therefore, cannot be held responsible for the conduct of his child during the time he is in school or on his way to or from school.[66]

Decisions in other cases indicate that the control of the school over the acts of the pupil extends even further than these limits. In the case of Laehder and Edick v. Manasquan, a high school baseball team had visited the city of Trenton on a school day and under the direction of the principal of the school to play a game of baseball. The team traveled in automobiles, part of them with the principal, others separately. After the game, they were all ordered to return to their home town immediately, but, except for those with the principal, they failed to do so, but reached home after midnight. As a punishment for this infraction of rules, the team was informed on the following day that a game for the following Saturday, likewise in a neighboring town, would be canceled. This action was confirmed by the supervising principal of the schools. This game was thereupon canceled by the student manager, but, on urging from the neighboring school, their high school team was disbanded, but an independent team was organized on which seven members of the high school team played, and the game with the neighboring high school was played. The pupils were warned that if the game was played they would be suspended, but, nevertheless, persisted. The following Monday the supervising principal suspended all seven boys and notified the board of education that he suspended them "for wilful disobedience and defying school authority on Saturday, May 23d." The board at a meeting ratified and confirmed the action of the supervising principal, and from this action an appeal was made to the Commissioner. In one case, an appeal was made by a father that his son had remained in Trenton on Wednesday night with his knowledge and consent. To this plea the decision of the Commissioner was:

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[66] Tatham v. Board of Education of Borough of Wallington, State School Report, 1912, p. 132, decision of Com. of Ed.

> He went to Trenton as a member of the High School Team, and was clearly under the control of the Principal. His father had no legal right to give him permission to remain in Trenton. Such permission could only be given by the principal.[67]

A further plea was made by the parents that "the Board exceeded their authority in punishing pupils for going to Lakewood on Saturday, a school holiday." The Commissioner, while recognizing that there were no court decisions in New Jersey on this point, relied on authority in 35 Cyc. 1137, and in the case of Dresser vs. Dist. Board, 116 N. W. Rep. 235. The former of these recognized the power of school authorities to forbid pupils to play games under the auspices of the school, even on holidays and away from the school grounds, and the latter recognized their power to punish a pupil "for an offense committed outside of school hours, and not in the presence of the teacher, which has a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, to set at naught the proper discipline of the school, to impair the authority of the teachers and to bring them into ridicule and contempt." On the basis of these decisions, the Commissioner ruled:

> The Supervising Principal would have been derelict in his duty had he failed to punish the sons of the Appellants for their disobedience. The discipline of the school would have been injured and the authority of the teachers impaired.[67]

From this decision, it is evident that the power of the school authorities to control the conduct of pupils extends beyond the period of their going to or from school, or the time they spend in the school or on school grounds. It extends to those occasions when they are acting elsewhere under the auspices of the school, or to their actions at any time or place which tend "to set at naught the proper discipline of the school, to impair the authority of the teachers and to bring them into ridicule and contempt."[67]

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[67] Laehder and Edick v. Board of Education of the Borough of Manasquan, S. L. D., p. 310, decision of Com. of Ed., Oct. 26, 1914.

D. Punishment of Pupils by Suspension or Expulsion

The code places in the hands of the teacher, which would include all principals and supervising principals, the power to

> * * * suspend from school any pupil for good cause; provided, that such suspension shall be reported forthwith by the teacher to the board of education; provided further, that in any school in which more than one teacher shall be employed the principal alone shall have the power to suspend a pupil.[68]

The power to suspend a pupil is likewise given to boards of education of Article VII districts.[69] Whether this would be construed by the proper authorities to include only cases appealed by teachers or principals, or would include as well those in which the board took the original action, is not indicated. In the absence of interpretation, it may be assumed to cover both types of cases. There is no indication that this authority is specifically given to boards in Article VI districts, although it may be assumed under the more general power to make rules and regulations for "the government and management of the public schools" of the district[70] and under the provision by which the board is given "supervision, control and management of the public schools."[71]

Suspension from school means, evidently, the removal of the pupil from the school and its activities by the proper authority for a temporary period of time as a mode of punishment. Expulsion, on the other hand, would seem to mean the definite and final removal of the pupil from the school and its activities by the proper authorities. The power of expulsion is a judicial function to be exercised by the school board alone. It is expressly given to Article VII boards in the same section by which the power of suspension is given, and may be assumed to belong to Article VI boards as well, since

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[68] Code, Sec. 172.
[69] Code, Sec. 127 (VIII).
[70] Code, Sec. 65 A.
[71] Code, Sec. 64.

> * * * an examination of Articles VI and VII discloses that in the latter the powers of the board of education are prescribed with considerable detail, while in Article VI they are expressed in general terms.[72]

The law specifies the reasons for which pupils may be suspended or expelled,[73] and it is assumed that the gravity of the offense or its persistent repetition will determine which of the two punishments is to be meted out. The offenses which merit such punishment are:

1. continued and wilful disobedience;
2. open defiance of the authority of the teacher;
3. the use of habitual profanity or obscene language.

An additional offense for which pupils "shall be liable to suspension and punishment," which it is assumed includes expulsion if that should be necessary, is

4. cutting, defacing, or otherwise injuring any schoolhouse, furniture, fences, outbuildings, or other property of the district.

The power of expulsion, which is the province of the board, is not capable of being delegated:

> A Board of Education cannot delegate to a superintendent or principal judicial powers conferred upon it by law. It cannot legally delegate to the superintendent or principal the power of deciding whether or not a pupil should be expelled.[74]

Since this power is a judicial one, it is to be assumed that it should be exercised at a meeting of the board,[75] at which time the charges will be made known, the evidence produced, and the pupil given a hearing, prior to formal action against him.

The question arises as to the length of time for which a pupil can be suspended. It has been decided[75] that it cannot be for an indefinite period. In another case a pupil was suspended from school from December 13 until the end of the school year. This was found by the Commissioner to be unreasonable. In his decision he said:

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[72] Klein et al. v. Board of Education of Jersey City, S. L. D., p. 317, decision of Com. of Ed., Nov. 30, 1912.

[73] Code, Sec. 187.

[74] Spence and Spence v. Board of Education of Atlantic City, S. L. D., p. 286, decision of Com. of Ed., Jan. 4, 1915.

[75] Boyd v. Board of Education of Borough of Bergenfield, S. L. D., p. 313, decision of Com. of Ed., Jan. 2, 1917.

> A high school education is of tremendous value to a boy or girl, and no boy or girl should be deprived for such a long period of time of the right to such an education without most serious consideration. * * * The only punishment the law permits in the public schools of New Jersey is suspension or expulsion from school for offenses against the good government and discipline of a school. The object to be attained by suspension or expulsion is to have some means of maintaining good order and respect for authority in the schoolroom, but the punishment must not be so excessive and unreasonable in its severity as to cause disrespect for the authority that administers the punishment.[76]

This decision gives us the general principle that suspension must be reasonable in length and not excessive, as related to the offense committed.

The exact offenses for which pupils may be suspended cannot easily be enumerated. The general reasons were given previously. In the case just cited (Hoey v. Lakewood), the reasons given by the principal for suspension were truancy, disobedience, swearing, insubordination, dismissal from algebra, dismissal from physical training, dismissal from chapel, and insolence. At the hearing before the board on which evidence on the charges was brought forth, teachers were called to testify, and

> * * * bore testimony to the fact that the boy was a restless, disturbing element in recitation classes and that he frequently left the room without permission. It was also stated that on one occasion, he swore at a boy who was standing between him and the blackboard from which he desired to copy some work. It was shown by the teachers that the boy had been frequently reported to the principal for disturbing the class exercises, but there was no testimony that tended to establish any capital offense in the schoolroom, if we except the one instance upon which a teacher testified that the boy used language which might be called ''swearing.''[76]

This statement would seem to make it clear that restlessness, petty annoyance, neglect to follow routine rules of the school, and disturbing classroom work are not sufficient to justify suspension, especially when the evidence fails to disclose that the pupil is wilfully disobedient. "Swearing," however, is of sufficient gravity to merit such punishment.

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[76] Hoey v. Board of Education of Lakewood, S. L. D., p. 315, decision of Com. of Ed., Apr. 28, 1920.

In another case the question of the pupil's clothing became a reason for suspension.

> An absence of shirt collar is not sufficient warrant for excluding a pupil from school. The teacher has the authority to discipline, and this may extend to a pupil's dress, but the authority must be exercised reasonably and within bounds of common sense. The fact that it was hot weather, that the parents dressed the children and were satisfied with the dress is somewhat beside the mark. Had the children gone to school not only without collars but without shirts of any kind it would have perhaps met the exigencies of the hot weather, but it would have been subversive of discipline in the school.[77]

If a board of education makes a rule prohibiting the organization of fraternities in a high school, and prohibiting pupils from joining them, the power of suspension or even expulsion, if properly used, may be exercised against them. They cannot be punished, however, for refusing to sign a pledge or promise not to join such organizations in the future. On this point the Commissioner's decision said in part:

> I do not believe that a board of education has the power to punish a pupil for refusing to promise that some time in the future he will not commit some act prohibited by the board. * * * A pupil should not be denied school privileges except for the most serious offenses.[78]

Elsewhere in a similar case the Commissioner said:

> Frequently teachers ask pupils not to do certain things that are in contravention of the discipline of the school, and there is nothing wrong in asking for such a promise. The question at issue, however, is not whether the principal erred in requesting the pledge; the error lies in the attaching of a punishment or penalty in case the promise was not made. Such a pledge, in order to be legitimate and effective, should be voluntarily given by the pupil, and when a principal undertakes to prescribe or inflict a penalty in the event of such a promise or pledge not being made, then the principal and the board of education in ratifying such action overstep their authority and their legal rights.[79]

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[77] Turner v. Board of Education of Borough of Merchantville, State School Report, 1915, p. 63, decision of St. Bd., Feb. 6, 1916.

[78] Spence and Spence v. Board of Education of Atlantic City. See footnote [74] *supra.*

[79] Crate et al. v. Board of Education of City of Camden, State School Report, 1921, p. 323, decision of Com. of Ed., July 31, 1921.

A very common mode of punishment used with pupils is the requirement of an apology. It may be that teachers or principals can legally demand an apology, but it seems evident that they cannot legally punish a pupil for refusing to apologize:

> Teachers or Boards of Education cannot make a rule providing for the enforcement of an apology. * * * A pupil may voluntarily apologize for an offense. He cannot, however, be made to apologize for an offense. The only punishment for disobedience that the law provides is suspension or expulsion from school. It does not provide that a pupil for a certain act can be suspended and at the same time can be forced to make an apology.[80]

E. Corporal Punishment of Pupils

The New Jersey school law is very explicit in forbidding corporal punishment of pupils. The provision is quoted in full:

> No principal, teacher or other person employed or engaged in any capacity in any school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon any pupil attending such school or institution, and every resolution, by-law, rule, ordinance or other act of authority heretofore or hereafter passed, adopted, approved, made or given by any person or persons whomsoever, natural or artificial, permitting or authorizing corporal punishment to be inflicted upon any pupil attending or that may attend any school or educational institution shall be henceforth void and of no force or effect.[81]

It should be noted that this law contains the following points:

1. It covers principals, teachers, and all other employees;
2. It includes pupils in both public and private schools and in all other educational institutions;
3. It nullifies in advance any attempts to pass regulations either by school authorities or by municipal authorities by which corporal punishment would be possible;
4. It fails to define the term "corporal punishment."

For an adequate definition or delimitation of the term, we must look to the decisions of the courts or of the school tribunals. In the case of Craze v. Allendale we find the following statement:

> Corporal punishment may in the Commissioner's opinion be defined as any punishment causing or intended to cause bodily pain or suffering.[82]

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[80] Boyd v. Board of Education of Bergenfield. See footnote [75] *supra.*

[81] Code, Sec. 173.

[82] Craze v. Board of Education of Allendale, (In *MSS.*), decision of Com. of Ed., Jan. 7, 1930, reversed by St. Bd., May 10, 1930.

In reversing the Commissioner's decision in this case, the State Board brought out an important element in corporal punishment. Their decision states that "pulling" or "nipping" the hair of a pupil is not corporal punishment within the meaning of the law when

> * * * the act was not done with any intent to punish, to inflict pain as a penalty for an infraction, but merely to direct the attention of a pupil. * * * For such an act to be unlawful there must be an unlawful intent, and this is absent in the present case. To support a judgment involving such serious consequences [*i. e.*, dismissal of a teacher under tenure] to the appellant, the proof against her should be clear, positive and convincing.[82]

Evidently the intent of the teacher in such case to inflict pain is of more importance than the fact whether pain is actually inflicted, as is evidenced in the following:

> It is not sufficient to plead that the punishment inflicted [*i. e.*, striking with the hand, shaking pupils, and pulling their hair] was not of a serious nature, although it is true that few of the children testified that they were hurt, and only one stated that the punishment was such as to make him cry.[83]

In another case, where boys in a school had been committing nuisances and had been guilty of misconduct, the janitor caught them in the act. As they ran out of the building he slapped each boy "on the behind." The Commissioner of Education decided that this does not constitute a violation of that section of the school law forbidding corporal punishment.[84]

It is evident, therefore, that "intent to inflict" such punishment must be carefully defined and actually determined to exist before the occurrence of corporal punishment can be shown.

F. Control of Pupil Activities

Reference has previously been made to the extent of control which may be exercised by the school authorities over pupil activities, such as athletic sports and school fraternities. In the former the right of a board of education to control school sports was shown by a decision of the Commissioner.[85] In the latter case, the right of a board to punish a pupil for joining a fraternity, contrary to the rules of the board, was established.[86] The power to control the ordinary pupil activities is to be inferred partly from the power of boards to make rules, regulations, and by-laws "for the government and management of the public schools and the public school property in said district."[87] In the case of Article VI districts it may also be inferred from the statement that the "board shall have the supervision, control and management of the public schools and public school property in its district;"[88] in the case of Article VII districts it is to be inferred from the provision which permits a board to use or permit the use of the schoolhouse and rooms, the grounds and other property of the district, when not in use for ordinary school purposes, "for the purpose of holding athletic, social, civic and recreational meetings and entertainments and such other purposes as may be approved by the board of education."[89] The same section permits the board to expend its funds to equip other than school property for such purposes.

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[83] Schermerhorn v. Board of Education of Hanover Township, State School Report, 1920, p. 192, decision of Com. of Ed., Mar. 18, 1920.

[84] Tatham v. Board of Education of Wallington. See footnote 66 *supra*.

In the case of school clubs or societies, a special provision of the code[90] is set up in order to exclude secret fraternities, but not to affect what are commonly known as school clubs. This act was passed in 1922, to some extent at least, as an aftermath of the high school fraternity case in Camden, that of Crate et al. v. Board of Education of City of Camden. This act defined a secret fraternity, and strictly forbade their formation in public high schools of the state and furthermore required boards of education to pass appropriate rules and regulations "providing for the necessary disciplinary measures to enforce this act." The definition for these prohibited societies is as follows:

> For the purpose of this act, a fraternity, sorority or secret society in the public schools of this state is defined to be an organization composed in

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[85] Laehder and Edick v. Board of Education of Manasquan. See footnote [67] *supra.*

[86] Spence and Spence v. Board of Education of Atlantic City. See footnote [78] *supra.*

[87] Code, Secs. 65 A and 127 (III).

[88] Code, Sec. 64.

[89] Code, Sec. 129.

[90] Code, Sec. 188.

> whole or in part of public school pupils, which seeks to organize and perpetuate itself by taking in members from among the pupils enrolled in such school in which they are students, upon the basis of decision of the membership of such organization, rather than from the free choice of any pupils in such school, who are otherwise qualified to fill the special aims of such organization.[91]

To this definition is added the stern indictment that

> Such fraternity, sorority or secret society of public school pupils is hereby declared to be an organization inimical to the good of the school system and to the democratic principles and ideals of public education and to the public good.[91]

The decision of the school tribunals in the Atlantic City case, even though made prior to the passage of this act, has a bearing upon the powers of boards in such cases. This case emphasized the extent to which the power of the board could be exercised:

> I have no doubt as to the right of a board of education to prohibit pupils from joining fraternities, sororities, or other school societies which, in its judgment, are prejudical to the best interests of the school or the pupils, even though the meetings of such societies are not held in the schoolhouse, or on a school day.[92]

G. Control of Juvenile Disorderly Persons or Juvenile Delinquents

1. Definition of a juvenile disorderly person, or juvenile delinquent.

   According to the Compulsory Attendance Law, these terms include "every child between the ages of seven and fourteen years, and every child between the ages of fourteen and sixteen years who is not lawfully employed in some useful occupation or service,"[93]

   (a) who shall repeatedly be absent from school;
   (b) any child found away from school during school hours whose parent or other person in control is unable to cause him to attend school;
   (c) an incorrigible pupil;
   (d) a vagrant child;
   (e) a child who is vicious or immoral in conduct.

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[91] See footnote [79] *supra.*

[92] See footnote [74] *supra.*

[93] Code, Sec. 243.

The act[94] permitting school districts to establish special schools for dependent and delinquent children, under sixteen years of age, when committed by the court, requires such schools to "receive, restrain and instruct dependent and delinquent children, and children under the age of sixteen years, who shall be

(a) habitual truants;
(b) habitually insubordinate;
(c) incorrigible or disorderly during their attendance at school."

The act[95] authorizing the establishment of parental schools in counties, does not define the term or make classifications, but does bring juvenile delinquents under the age of 18 years within the provisions of the act.

According to the opinion of the Attorney-General, previously quoted, a pupil who has not been vaccinated, and whose parent keeps him out of school and provides for him no other equivalent educational training, is a juvenile disorderly person.[96]

The action to be taken against such juvenile delinquents will be discussed elsewhere in this chapter in connection with the provisions of the Compulsory Education Law. It is to be noted, however, that in case a pupil is found incorrigible, truant, or morally vicious, mere expulsion from school is not sufficient under the law so long as the child is under 16 years of age and is not lawfully employed. The law requires that such a child must be proceeded against, and, if found guilty, must be dealt with under the provisions of the law. There is no provision, however, requiring the placing of such a child in properly organized schools for delinquents, since the establishment of such schools depends upon the initiative and interest either of the local school authorities or of the judges of the courts of common pleas.[97]

VII. The Employment of Children

It is not the province of this study to discuss all of the types of employment or conditions of employment for children in New

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[94] Code, Secs. 493-505.

[95] Code, Secs. 566-575.

[96] See footnote [55] *supra*.

[97] See pp. 430–431.

Jersey. It is only as child employment touches the schools or school law that it becomes a part of this investigation.

So far as school attendance is concerned, employment of children is not a matter of concern in the case of children over 16, since that is the upper limit for compulsory attendance. There is only one exception to this, and that is the establishment of proof of age for children over 16 seeking employment.

The law permits minors between the ages of 14 and 16 years to be employed under certain conditions and in certain types of employment. In securing such employment, such a minor must meet certain qualifications and obtain certain papers or certificates. The first and most important of these is the "Age and Schooling Certificate." This is a certificate granted pursuant to law by the Supervisor of School Exemption Certificates, authorizing the holder to cease attending school when employed in an occupation lawful for children between the ages of 14 and 16 years.[98] This Supervisor of School Exemption Certificates "shall mean any superintendent of schools, supervising principal, principal or teacher of any school district who shall be designated by the board of education in that district to carry out the provisions of this act."[98]

The requirements for securing an Age and Schooling Certificate are:

A. The parent, guardian, or custodian of the child must apply for the same in person, to the supervisor of exemption certificates in the district where the child resides;[99]

B. Legal proof must be submitted that the child is 14 years or more of age. Such legal proof acceptable would be either a birth certificate, a passport, a baptismal certificate, or both, or other legally acceptable evidence;[100]

C. Medical inspector's certificate, describing physical condition of the child and certifying as to whether the child has the normal physical development for a child of his age and is physically able to be employed in a type of work for which a child of that age is legally qualified;[101]

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[98] Code, Sec. 230.

[99] Code, Sec. 232.

[100] Code, Sec. 234.

[101] Code, Sec. 236.

D. Filing of satisfactory proof that the child has regularly attended public school or received equivalent schooling elsewhere for not less than 130 days during the 12 months previous to date of application, is able to read and write,[102] has completed the eighth grade and is fourteen years of age, or has completed the sixth grade or an equivalent program, and is fifteen years of age;[103]

E. The Age and Schooling Certificate as filled out by the Supervisor of School Exemption Certificates must be signed in his presence by either the child himself or by other person having custody of the child.[104]

After securing the Age and Schooling Certificate, the child presents it to the person or firm which is to employ him, and with it a blank form called the "Employer's Certificate,"[105] which is to be filled in by the employer. This states the nature of the work, the date the child starts work, the salary, and an agreement to permit the child to attend continuation school for the time required by law. When properly filled out by the employer it is forwarded to the supervisor of school exemption certificates for filing.

A. Duties and Responsibilities of the Employer

1. He must keep the age and schooling certificate on file while the pupil works with him;
2. After the child ceases to work for him, he must return the age and schooling certificate to the supervisor of school exemption certificates in the school district where the child lives, or, if that is unknown, to such supervisor in his own district;[105]
3. If the child misrepresents his age, that does not absolve the employer of responsibility:

> The fact that a boy under sixteen years of age, secures employment by presenting a certificate of being over that age, which was not in fact his certificate, does not absolve the employer from the charge of negligence in employing the child.[106]

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[102] Code, Sec. 237.
[103] P. L. 1931, Chapter 307.
[104] Code, Sec. 238.
[105] Code, Sec. 241.
[106] Volpe v. Hammersley Mfg. Co., 96 N. J. L. 489 (1921).

B. Duties of the Child's Parents or Other Persons in Control of Child

1. Such person must send the child to continuation school, if if he holds an age and schooling certificate—
   (a) if the child is temporarily unemployed, at least 20 hours each week;
   (b) if the child is employed, at least 6 hours each week for at least 36 weeks in the year.

   Attendance is to be in school district or county in which child is employed during the hours such continuation school is in session; if there is none in such district, he must attend one in the district or county of residence, if it is convenient of access.[103]

C. Duties of the Supervisor of School Exemption Certificates

1. He must issue age and schooling certificates when conditions are met;[107]
2. Administer oaths and affirmations and take affidavits required in proceedings pertaining to application for age and schooling certificates;[108]
3. Issue certificates of date of birth and administer oaths or take affidavits in connection therewith; such certificates to serve as valid authority that children concerned are over 16 years of age and require no age and schooling certificates;[109]
4. Keep a record of all age and schooling certificates and data thereon;[110]
5. Send original papers on which age and schooling certificate is granted to State Department of Labor for examination;[111]
6. Deliver one duplicate of each certificate of date of birth to the child and the other to the State Department of Labor to be filed;[109]
7. Secure and retain age and schooling certificate for unemployed child until child again secures lawful employment; [112]

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[107] Code, Sec. 238.
[108] Code, Sec. 235.
[109] Code, Sec. 254.
[110] Code, Sec. 240.
[111] Code, Sec. 239.
[112] Code, Sec. 245.

8. Take proper proceedings to enforce attendance at school of any child who fails to secure employment.[112]

D. Miscellaneous Provisions Concerning Employment of Minors

1. Hours of employment for minors under 16 in manufacturing plants or mercantile establishments to be not more than 8 hours per day, or 48 hours per week; provided that the hours of employment shall not be over 42 per week during the time the continuation school is in session; such minors may not be employed before 7 A. M. nor after 7 P. M., nor on Sunday.[113]
2. Inspection of establishments. The Commissioner of Labor, the assistant commissioner, the inspectors, attendance officers, or any public officer designated by law to protect children from cruelty and neglect, have both the duty and the power to investigate and inspect mercantile establishments and manufacturing plants,[114] to enforce the provisions of the act, and attendance officers are given the right to inspect the register of employment of minors, as filed in the offices of factories and commercial or manufacturing plants to determine whether children are legally employed.[115]

VIII. THE ATTENDANCE OF CHILDREN AT SCHOOL

A. The Provision for Compulsory Attendance

The basic provision for compulsory attendance as contained in the Acts of 1903, 1914, and 1919 has been radically changed by the 1931 legislature.[116] The analysis of the law on this subject is, therefore, on the basis of this latest amendment.

> Every parent, guardian or other person having custody and control of a child between the ages of seven and sixteen years shall cause such child regularly to attend the public schools of such district or to attend a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school. * * *

In the same act, "regular attendance" is defined:

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[113] Code, Secs. 637, 638.

[114] Cum. Sup., Vol. 1, pp. 1721–1723.

[115] Cum. Sup., Vol. 2, p. 1673.

[116] P. L. 1931, Chapter 307.

Such regular attendance shall be during all the days and hours that the public schools are in session in said school district.

The requirement of "regular attendance" is not necessarily broken when a pupil is excused from school a certain number of hours each week for such purposes as religious instruction, music lessons, or for similar educational activities not under the control of the school authorities. In the case of Randolph v. Morristown Board of Education, the State Board reversed the decision of the Commissioner of Education which had held such excusals unlawful and in contravention of the compulsory education law.[117]

B. Exemptions from Compulsory Attendance

1. A child who has been granted an age and schooling certificate and is regularly and lawfully employed in some useful occupation or service. Such child must be above fourteen years of age and have completed the eighth grade, or above fifteen years of age and have completed the sixth grade or equivalent.[116]
2. A child whose mental condition has been shown to the satisfaction of the board of education of the district to be such that he cannot benefit from instruction in the school.[116]
3. A child whose bodily condition is such as to prevent his attendance at school.[116]
4. No exemption for a child (evidently other than above noted), under the age of sixteen years who is not regularly and lawfully employed in some useful occupation or service.[118]

C. The Responsibility for Seeing that the Child Attends School

1. The pupil himself is responsible, since he is required to "comply with the regulations established in pursuance of law for the government of such schools,"[119] and is subject to certain legal action if he refuses to comply;[120]

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[117] Randolph v. Morristown Board of Education, decision of St. Bd., Minutes of State Board, Dec., 1924, p. 1969, reversing decision of Com. of Ed., Mar. 4, 1924, State School Report, 1925, p. 275.

[118] Code, Sec. 233.

[119] Code, Sec. 187.

[120] Code, Sec. 247.

2. The parent, however, is primarily responsible, under the basic provision noted above from P. L. 1931, Chapter 307.[121]
3. The board of education also has a definite responsibility, since it is required to appoint a suitable number of attendance officers, and is required to pass suitable rules and regulations for the government of the attendance officers.[122]

   This obligation of the board has been strengthened by a decision of the Commissioner in the case of Randolph v. Morristown,[117] just cited:

   > The School Law provide [s] in Section 229, Article XV [Section 246, 1928 Code], that boards of education shall appoint attendance officers to enforce the Compulsory Education Law. It is the Commissioner's opinion that this section of the law obligates the board of education to enforce the Compulsory Education Law in its entirety, and places upon such board an obligation equal to that placed upon the parents to enforce the child's attendance at school every hour of the session.

4. The supervisor of school exemption certificates, whether he is the superintendent, a supervising principal, a principal, or a teacher, is required to take proper proceedings to enforce the attendance at school of children who hold age and schooling certificates and fail to secure employment.[123]
5. Attendance officers are required to enforce the Compulsory Education Law, and are in this respect the direct agents.[120]
6. While the school law establishes no direct responsibility for teachers, principals, supervising principals, and superintendents in the enforcing of this law, except so far as keeping the school register is an aid, they may be made responsible, and doubtless frequently are, under rules and regulations of the board employing them.

D. Penalty Provided by Law for Non-Compliance with Provisions of the Compulsory Education Law

1. A pupil, when habitually truant, or repeatedly absent may be deemed a juvenile disorderly person or a juvenile delinquent. Such children are subject to arrest, may be

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[121] See also Code, Secs. 244, 245.
[122] Code, Sec. 246.
[123] Code, Sec. 245.

brought before the county Court of Common Pleas or Juvenile Court, or before the local recorder. If found guilty, they may be committed by the court or magistrate.[124]

2. The parent or other person in control of the child, if found guilty, may be fined not over $5 for the first offense, and not over $25 for each subsequent offense.[125]

E. What Constitutes Attendance at School

The Rules and Regulations of the State Board of Education provide that

> * * * the presence of a pupil merely at roll call shall not be considered a sufficient attendance to comply with the intent of the law. A pupil must be present at least one hour during any forenoon, afternoon or evening session in order to be recorded present.[126]

IX. PROVISION FOR SPECIAL TYPES OF CHILDREN

A. Dependent or Delinquent Children

The definition of "delinquent" child and certain general provisions concerning such children are discussed elsewhere in this chapter. The School Law provides for two types of parental schools for such children. These may be established by school districts and supported out of district funds[127] or may be set up by counties of the first class.[128] When the judges of the county Court of Common Pleas deem a county school necessary, they appoint a board of trustees of five members, one of whom is to be a woman and one a juvenile court judge. This type of school for delinquent children is supported out of county funds, for which requisition is made by the board of trustees, but the amount of which is controlled by the county board of chosen freeholders, whether for capital outlay or for current expense. By the provisions of P. L. 1930, Chapter 240, the limit for capital outlay expenditure for any county school is set at $750,000.

The purposes of both types of parental school are essentially the same. They are, briefly:

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[124] Code, Secs. 244, 247, 493-505, 566-575.

[125] Code, Sec. 244.

[126] Rules, No. 79, p. 510.

[127] Code, Secs. 493-505.

[128] Code, Secs. 566-575.

1. To serve as a detention house and school for delinquent children. In the district parental school, the program of studies is of the industrial type, and is to be subject to the approval of the State Board of Education. In the county type school, the board of trustees, subject to the approval of the Board of Chosen Freeholders, has full control over the program of studies, but is to pay special attention to courses in industrial training and in agriculture.
2. To serve as a house of correction for juvenile delinquents; or for those convicted of certain crimes.
3. To serve as a holding place for important juvenile witnesses in certain criminal cases.
4. In each type, the law stresses the purpose of moral and intellectual improvement, and for training in citizenship.

B. Handicapped Children

The code recognizes and provides for at least five classes of handicapped children.[129]

1. Subnormal children. The provision of the code in respect to this type of children is that

> * * * each board of education in this State shall ascertain what children, if any, there are in the public schools who are three years or more below the normal. * * *

When there are as many as ten such children in any school district, the board of education must establish a special class, no class however to contain more than fifteen children. It seems evident, from an opinion by Commissioner Kendall, that the expression "three years or more below the normal" has been more clearly defined. He states that the question arose as to what children were affected by the law apportioning $500 by the state for each teacher of such children.

> It was decided that it applied only to those who teach children who are *mentally* three years or more below the normal; that it did not apply to children who are three years or more below the grade,

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[129] Code, Sec. 194.

either by reason of irregular attendance, illness, or causes other than mental defects.[130]

2. Blind or near-blind children—special classes mandatory when there are five or more such children in a school district.
3. Deaf children—special classes mandatory when there are ten or more such children in a school district.
4. Crippled children—special classes mandatory when there are eight or more such children in a school district.

Special classes for blind and deaf children are not required when the children are cared for in institutions or can better be cared for in such places.

Proper facilities for crippled, blind, near-blind, and deaf children who are properly certified as unfit to be instructed in classrooms usually provided are to include, when recommended or approved by the Commissioner of Education:

(a) home-teaching, bedside instruction, and transportation;
(b) payment of tuition in and transportation to a special class for crippled children, or maintenance while away from home to attend a special class in another district;
(c) scholarships in vocational and technical schools;
(d) Schools for children in hospitals, convalescent homes and other institutions for any of the three types of physically handicapped children named above. This class is permissive only, and when there are eight or more such children available for instruction.

Each board of education in the state is required to make a register of physically handicapped children from birth to twenty-one years of age residing in the district, and send copies of such lists annually to the Commissioner of Education.

C. Indigent Children

There is no provision for special classes for indigent children. By the act of March 23, 1883, as amended in 1929,[131] however, the body having control of finances of any city in the state may raise not over $3,000 annually in its tax levy which, together with any funds from voluntary contributions, is to be

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[130] State School Report, 1912, p. 66.
[131] P. L. 1929, Chap. 194.

> * * * expended for the relief and primary education of such indigent, homeless or deserted children of said city as, by reason of their age, their inability to obtain suitable clothing, their necessary occupations or otherwise are unable to attend the public schools; provided, however, that the moneys thus appropriated shall be expended under the direction of the board of education of said city.

D. Education of War Orphans

By the provisions of an act of 1930, war orphans are given special educational aid. War orphans are defined as children between the ages of 16 and 21 years, residing in the state at least one year before the enactment of the law, who are children of persons in the military or naval service of the United States during the World War in active service who were killed in action or died from other cause between April 6, 1917, and July 2, 1921. The state appropriates not over $5,000 annually, by which such war orphans may receive a maximum of $125 annually for not more than four years, to defray in part the cost of education in a secondary or higher school, located in New Jersey. The fund is administered by the Adjutant-General of the state.[132]

X. TRANSPORTATION OF PUPILS

The discussion of transportation of pupils in this chapter will refer only to the legal requirements demanding transportation service, and to the obligation upon school districts to provide it. The requirements of the law relating to the letting of transportation contracts, and decisions upon that point, are presented in another chapter.[133]

A. The Necessity for Transportation

In some cases transportation of pupils is optional with a board, in others mandatory. If it is mandatory, the service will be approved by the county superintendent of schools and receive apportionment of state aid. If optional, it will receive such aid only on his approval.[134]

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[132] P. L. 1930, Chap. 44.

[133] See Chapter VII, pp. 178–194.

[134] Code, Sec. 273.

In the following instances, transportation is mandatory:

1. for crippled children, when the district maintains a special class for them;[135]
2. for deaf, blind, and near-blind children, when recommended and approved by the Commissioner of Education, to classes maintained in the district or in other districts;[136]
3. for children living remote from the school to which they are assigned; this may mean:
   - (a) remoteness from a school in their district to which they are assigned by the board of their own district;[135]
   - (b) remoteness from a school in an adjoining district to which they have been assigned by the county superintendent because of their being remote from a school in their own district;[137]
   - (c) remoteness from a school, either elementary or high school, in another district which has been designated by the school board of their own district for their attendance.[138]

There are two sections of the school law bearing upon the subject of pupil transportation which are so basic in their provisions that they are here quoted in part. These are provisions made in the 1903 act, and in 1907. These two sections came to be identified as sections 117 and 126 of the school laws, and are frequently referred to in decisions by those section numbers. The former of these provides:

> Whenever in any district there shall be children living remote from the schoolhouse, the board of education of such district may make rules and contracts for the transportation of such children to and from school.[135]

This is the section of the law which establishes ''remoteness'' as a principle in transportation.

The latter section reads in part:

> Each school district shall provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments

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[135] Code, Sec. 184.

[136] Code, Sec. 194.

[137] Code, Sec. 185.

[138] Code, Secs. 183, 186.

> of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils or as provided in sections one hundred seventeen, one hundred eighteen and one hundred nineteen of the act to which this act is an amendment.[139]

This section establishes "convenience of access" as a part of the "suitable school facilities and accommodations" which all districts are required to provide. It provides three alternatives for a school district in establishing school facilities. Such provision may be made

1. in schools within the district convenient of access to the pupils;
2. by transportation to schools within the district;
3. by permitting the child to attend school in another district, and paying its tuition. In this case the need for transportation depends, as in the second alternative, upon "remoteness."

These alternatives were very clearly brought out in the case of Phillips v. West Amwell Township:

> It is obvious from such alternatives that school facilities must either include the establishment within a school district of a schoolhouse convenient of access by location or transportation for all the pupils therein, or that pupils be transported to schools in other districts, or if remote from the school in their own district, that their tuition be paid in a nearby school in an adjoining district. Convenience of access, however, by one means or another is specifically provided for in every one of the above quoted alternatives for providing proper school facilities for "all the children residing in the district."[140]

An earlier decision on the same point which was not carried to the Supreme Court for final action was in the case of Smith v. Pilesgrove Township, in which the following was stated:

> The thing the Board of Education is commanded to do is to provide a suitable building, placed so that it may be convenient of access to the home of the child. It is only as an alternative proposition that a Board of Education under the provisions of the law may choose to furnish trans-

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[139] Code, Sec. 196.

[140] Phillips v. Board of Education of Township of West Amwell, S. L. D., p. 226, decision of Com. of Ed., Dec. 15, 1925, affirmed by St. Bd., Jan. 9, 1926, and by Supreme Court, Jan. 19, 1927.

> portation in lieu of a school building convenient of access to the children. The Board must provide either one or the other.[141]

An equivalent opinion is given also in Read et al. v. Roxbury Township:

> It is therefore obligatory that Boards of Education shall furnish buildings convenient of access or in lieu of such facilities, they shall provide transportation for pupils remote from the school building.[142]

From the law as quoted, and from the decisions based upon it, it is evident that it is important to have an adequate definition of the expression "remoteness from school," or of its opposite in meaning, "convenient of access." The case of Foose v. Holland township, one of the important early decisions on transportation, brought out the following:

> It is impossible to fix any definite distance within which transportation is unnecessary, and beyond which it must be provided. The age and sex of the pupil, the condition of the roads, the distance, and, when part of the transportation is by car, the time of departure and arrival of trains, are all factors in determining the necessity for transportation.[143]

An earlier Phillips v. West Amwell township case than the one previously quoted, also assists in interpreting "remoteness":

> The fact that the distance from Appellant's house to the schoolhouse exceeds two miles, which factor alone is usually held to justify transportation for elementary pupils, together with the admitted youth of the children [6 to 7 years], and the poor condition of the roads over which they must travel, all go to make up, in the Commissioner's opinion, such remoteness of residence from the schoolhouse as to justify within the meaning of the statute the provision of transportation facilities.[144]

In still another case transportation facilities were provided by the district but were charged by the parents to be inadequate:

> In view of all the facts of the case, namely, the youth of the children involved [5 to 13 years], the undesirable wait after school hours [intermediate grades one hour, primary grades one and a half hours], and the

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[141] Smith v. Board of Education of Pilesgrove Township, S. L. D., p. 259, decision of Com. of Ed., Oct. 20, 1916.

[142] Read et al. v. Board of Education of Township of Roxbury, S. L. D., p. 238, decision of Com. of Ed., Mar. 17, 1927.

[143] Foose v. Board of Education of Township of Holland, S. L. D., p. 241, decision of Com. of Ed., July 1, 1913.

[144] Phillips v. West Amwell Township Board of Education, S. L. D., p. 224, decision of Com. of Ed., Jan. 29, 1925, affirmed by St. Bd., July 11, 1925.

> necessity during the winter months of their having to walk home after dark from the point at which they leave the transportation vehicle, it is the opinion of the Commissioner of Education that there is a failure on the part of the Board of Education of Franklin township to provide for appellants' children the adequate transportation facilities in lieu of a schoolhouse convenient of access, which it is required by law to do.[145]

Another decision brings in an additional factor:

> It is the Commissioner's opinion that the trips over the mountain each day, particularly hazardous during winter and spring months in the former instance, and the distance involved in the latter [13 to 16 miles each way around the mountain] especially in view of the youth of the children in question, render the school facilities as provided at present by the Hope Township Board of Education entirely inadequate and unsuitable for both groups of children above described.[146]

The case of Peace and Hing v. Independence township brings a final factor into consideration:

> [While a board may make a rule] to refuse transportation in all cases where pupils live within two miles of the school building, such a rule while having advantages as a working basis of determining the need for transportation does not take care of abnormal conditions. The age, sex and health of the child as well as the condition of the road over which it must travel should be taken into consideration.[147]

Probably the most comprehensive decision upon the factors which constitute remoteness, however, and the one in which the principle underlying its definition is most clearly set forth, is that of Read et als. v. Roxbury Township:

> The factors that contribute to remoteness in Foose v. Holland Township Board of Education, namely, age, sex, condition of the roads, etc., are such as may increase the time necessary to reach a school building. A young child would require more time than an older child; a girl may require more time than a boy of the same age; a child in poor health would need more time than a child in good health, and hence the health of the child would also be a factor in considering the necessity for transportation. It is also true that very poor roads would require more time to traverse

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[145] Pioppi et al. v. Board of Education of Franklin Township, State School Report, 1927, p. 77, decision of Com. of Ed., Dec. 22, 1926.

[146] In the Matter of the Application for the Re-establishment of the Free Union and Township Schools in Hope Township, Warren Co., State School Report, 1926, p. 63, decision of Com. of Ed., Dec. 24, 1925.

[147] Peace and Hing v. Board of Education of Independence Township, State School Report, 1928, p. 44, decision of Com. of Ed., Aug. 16, 1927.

> them than would good sidewalks or hard surfaced roads. Remoteness is therefore a relative term depending upon a reasonable time.[148]

The principle here enunciated, namely, that all of the factors named as determining remoteness, become factors only in so far as they affect the time necessary for the child to consume in reaching the school or the transportation route, is fundamental in its significance in the majority of the decisions upon transportation cases.

From the decisions so far quoted, it is evident that the following are factors in determining remoteness or convenience of access:

1. distance from the school;
2. age of pupils;
3. sex of pupils;
4. health of pupils;
5. condition of roads;
6. time of departure and arrival of trains;
7. dangers of the road.

Similarly, it is to be noted that transportation is not held acceptable which involves exceedingly long trips, traveling over dangerous roads, long waits for service, or walking by the children on public roads after dark, after leaving the transportation vehicle.

A number of these points require further definition or explanation from the decisions.

B. Distance From the School as a Factor in Determining Remoteness

From the decision in the case of Phillips v. West Amwell township quoted above,[149] it is noted that a distance greater than two miles from the schoolhouse is held to require transportation for elementary pupils, other factors not being of importance. This is emphasized also in the case of Siedletski v. Hope township:

> [When] the distance from the children's residence to the schoolhouse exceeds two miles, this factor is in itself according to the generally accepted

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[148] Read et als. v. Board of Education of Township of Roxbury. See footnote [142] *supra*.

[149] See footnote [140] *supra*.

standards in the case of elementary pupils sufficient to justify the demand for transportation facilities.[150]

In the case of Read et als. v. Roxbury township, previously cited, the standard of distances is explained:

> In many decisions upon school transportation and in the determination by County Superintendents of the necessity for transportation in their apportionment of State money, it has generally been held that children are not considered remote as to distance if they are of High School age and live within two and one-half miles of the school building, or if they are of elementary or grammar school age, and live within two miles of the building.[151]

The standard here given for high school children, however, is conditioned in the following decision:

> It has generally been held that children are not considered remote when they are of high school age and live within two and one-half miles of the school building or within two miles of a transportation route unless the exertion of walking the required distance would be detrimental to the health of the children.[152]

A similar decision is the following:

> In determining for apportionment purposes the need for transportation throughout the State by County Superintendents of Schools and in line with the many decisions, it has been held that a pupil attending an elementary school who lives within two miles of the building or high school pupils living within two miles of a transportation route are not remote unless the age, sex, health of the pupil, or the condition of the road would in line with the decision above quoted [Read v. Roxbury Township, stressing importance of the time element] add to the remoteness by increasing the time necessary to traverse the distance.[153]

However, all of these distance standards are always conditional:

> The word ''remote'' used in the statute, article 9, section 141, obviously cannot be construed to mean any fixed distance, but must vary in meaning with the attendant circumstances.[154]

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[150] Siedletski v. Hope Township Board of Education, State School Report, 1924, p. 258, decision of Com. of Ed., Apr. 8, 1924.

[151] See footnote [142] *supra.*

[152] Lewis v. Board of Education of Township of Mendham, Morris Co. (In *MSS.*), decision of Com. of Ed., Apr. 17, 1930.

[153] Pace v. Tewksbury Township Board of Education, State School Report, 1929, p. 64, decision of Com. of Ed., Sept. 19, 1928.

[154] Linch v. Board of Education of Upper Pittsgrove Township, State School Report, 1916, p. 206, decision of St. Bd., July 1, 1916, affirming decision of Com. of Ed., Apr. 14, 1916.

One of the best illustrations of the fact that distance itself is often not the determining factor is found in the case of Durling v. Montgomery Township. In this case, a boy of twelve years in order to attend high school must take a train from a station 2.4 miles from his home, and to reach the station must traverse a road of the usual country dirt type, and through a mountainous section. Nevertheless the ruling was:

> Appellant's son is a healthy boy of about twelve years of age and the distance to be covered from his home to the Skillman Station is approximately no more than the elementary pupils are able to cover on foot to their schools. It is therefore the opinion of the Commissioner that Appellant's son would find it no hardship either because of road or distance to walk the 2.4 miles to the railroad station at Skillman except during the four winter months of December, January, February and March, when in order to walk to the station he must necessarily leave home before daylight and arrive home after dark, and when the road conditions make walking more difficult. It is therefore the Commissioner's opinion that it is the respondent's obligation to either furnish transportation facilities to appellant's son during the four winter months above mentioned or to allow appellant the sum * * * proved at the hearing to be adequate for appellant to secure transportation for his son to and from the Skillman Station during such winter months.[155]

In general, however, there is stated in these decisions the principle that all other things being equal, transportation would be required for elementary pupils when the distance from their home to the schoolhouse exceeds two miles, and for high school pupils when the distance exceeds two and one-half miles from home to schoolhouse, or exceeds two miles from home to transportation route.

An additional issue which has caused some dispute is that of determining between what points the standard distances are to be measured. Is only that distance to be counted which lies on the public highway? In the case of Piell et al. v. Union Township, the Commissioner found that

> * * * when we consider the drift roads or lanes on which the children reside, which it is necessary to consider in order to determine the actual distance such children must travel, we find the distance equaling or even exceeding two miles.[156]

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[155] Durling v. Montgomery Township Board of Education (In *MSS.*), decision of Com. of Ed., Apr. 5, 1923.

[156] Piell et al. v. Union Township Board of Education, S. L. D., p. 234, decision of Com. of Ed., Nov. 10, 1922, affirmed by St. Bd.

The board of education in this case, however, was not satisfied that this was the legal method of determining the distance, and appealed the case to the State Board. That body, in sustaining the Commissioner, gave the following opinion:

> We agree with the Commissioner that, it being necessary to use these private ways to get to the public road, they must be taken into consideration in calculating the distance to the school.[156]

The same point was again argued in another case[157] a few days later and was given the same decision.

There have been attempts on the part of parents to secure approval of their demands for transportation for their children by asserting that their children are not strong, or are too young to walk a distance under two miles. In such cases the Commissioner and the State Board have inquired searchingly into the actual health of the children, in some cases securing testimony from the family physician. The burden of proof, therefore, lies upon the parent to prove such conditions in order to secure a reduction of the distance to less than the standards set, as is shown by the following opinion:

> To hold that children in the fifth grade of school work who are between ten and eleven years of age of approximately normal physical development are remote from schools in rural districts when they live within two miles of the school building would lead to large transportation costs since the rural schools generally serve a district within a radius of two miles.[158]

In another case, a board had, on account of overcrowded conditions in its schools, assigned a pupil to a school which was more distant than another one in the district. The parent protested, and claimed that in the event the assignment was upheld, the board must furnish transportation on account of the added inconvenience suffered, even though the distance was under two miles. The Commissioner, in denying the parent's appeal rendered the opinion that

> A Board of Education may legally designate a school more distant than another from the homes of children and only in the case of such

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[157] Loskot v. Bethlehem Township Board of Education, S. L. D., p. 231, decision of Com. of Ed., Nov. 23, 1922.

[158] Shoemaker v. Board of Education of Township of Liberty (In *MSS.*), decision of Com. of Ed., Jan. 10, 1930.

designated school being remote from the homes, may the board be required to provide transportation facilities.[159]

C. Condition of the Roads as a Factor

Another factor determining remoteness which has required interpretation is the condition of the roads. In the case of Shoemaker v. Liberty Township previously cited,[158] transportation was not allowed since, in addition to other reasons named, the roads were held

> * * * to be similar to the average unimproved road throughout the district and practically throughout the country.

It is not therefore considered necessary that the road be improved; other factors than the road surface may determine the "condition of the roads." In the case of Piell et al. v. Union Township

> * * * the testimony * * * disclosed that no one of the roads over which the pupils must pass to the school in question is an improved road, and further that such roads are wooded and are lonely by reason of the fact that houses occur along them only at infrequent intervals.[160]

Just what element is considered in this decision in the fact that the roads are "wooded and * * * lonely" is a matter of question. Whether it refers to the danger of the children becoming lost, or being attacked by animals, or molested by vagrants is unexplained. It may even refer to the fact that some children are so constituted that the very loneliness of the road would cause harmful results to their nervous system and their health.

In the case of impassable roads, however, a distinctly different situation exists. One of the outstanding decisions on this point is in part as follows:

> The home of appellant may not be remote because of the distance, but as pointed out by the State Board of Education, the condition of the road must be taken into consideration in determining the necessity for transportation. The uncontradicted testimony as to the flooded and otherwise bad road conditions shows that Tessie Bird could not walk by the road from her home to Creegor's Corner [to get the school bus] during the time

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[159] Topping v. Board of Education of Town of Montclair. See footnote 14 *supra.*

[160] Piell et al. v. Union Township Board of Education. See footnote 156 *supra.*

> of the bad road conditions and could not, therefore, be regular in her school attendance.
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> Bus transportation from a point inaccessible over public roads whether because of distance or exceptionally bad road conditions does not constitute adequate transportation facilities.[161]

The decision of the Commissioner in this instance was, that since suitable transportation facilities could not be made available to the pupil, the school board must pay a bill for board for the pupil in a family which transported her to high school. It is interesting to note that the penalty for bad roads in this case fell upon the school district, and not upon the township, which was responsible for the condition of the roads.

D. Danger as a Factor

Another factor which has often been contended should be considered, is that of danger to the children in walking to school. This may be a consideration, but is not necessarily so. The condition under which it must be given consideration in determining the necessity for transportation is explained in the case of Read et al. v. Roxbury Township:

> Danger does not in itself make a place remote unless it increases the time necessary to cover the distance to such an extent as to constitute remoteness. It seems, therefore, that only in its relation to delay can danger be considered and not because of the possibility of a child being hurt by automobiles. Boards of Education are not authorized by law to provide for the safety of children in reaching school.[162]

This opinion is somewhat amplified in the case of Lewis v. Mendham Township:

> There is no provision for transportation because of dangers to be encountered over the road which a child must travel in going from its home to the school building or to the transportation route. The physical protection of citizens on the highway whether from the reckless use of automobiles or molestation by disorderly persons is a matter under the control of the civil authorities and not the board of education.[163]

An instance in which danger as a factor was clearly recognized as affecting the provision of transportation, was in the case of the application of the Hope township board of education, where the use of vehicles over a mountain was described as "particularly hazardous during winter and spring months."[164] This point was raised not to show the need for transportation, but as an objection to providing transportation under the conditions existing.

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[161] Bird v. Board of Education of Washington Township, Morris Co., State School Report, 1927, p. 96, decision of Com. of Ed., Dec. 23, 1926.

[162] See footnote [142].

[163] See footnote [152].

E. How Far the Board of Education Must Go in Arranging Its Transportation Routes to Make Them Convenient of Access to the Children's Homes

This would appear to be a matter of discretion and good judgment with the board in meeting all the requirements of the particular situation. This is made evident in the decision of the State Board in Hausler v. West Amwell Township:

> [Where a] Board of Education appears to have endeavored to furnish transportation for the pupils of the district to the best of its ability, and to have used its best discretion in choosing the route over which the transportation is provided, * * * to require it to provide for every pupil whose home is inconvenient of access to its established route [1.7 miles by dirt road], would entail an expense beyond that which can in reason be required of it.[165]

While the board is required to consider the entire distance from a pupil's home to the school, including the distance along a lane or dirt road, in determining the need for transportation, this does not mean that the transportation vehicle must be brought to the pupil's door:

> It has of course been frequently held by this department that in a case where the distance necessitating transportation is made up of both lane and highway, the obligation of the Board of Education is fully discharged by providing transportation merely along the main road, and that the child must consequently meet the transportation vehicle at the point where the lane meets the highway.[166]

F. Where the Number of Pupils to be Transported is Small

In case there is only one or a few pupils in a certain area who are remote from school facilities, the board must be responsible for transportation at whatever cost, and may not require the parent to provide it. Decisions upon this point show unmistakably the responsibility of the board of education. Polk v. Centre Township contains the following statement:

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[164] See footnote 146.

[165] Hausler v. West Amwell Township Board of Education, State School Report, 1924, p. 246, decision of St. Bd., Apr. 5, 1924, reversing decision of Com. of Ed., Dec. 19, 1923.

[166] Loskot v. Bethlehem Township Board of Education. See footnote 157.

> A Board of Education cannot compel a parent to pay for the transportation of his child to and from school even though the Board agrees to reimburse him. A parent may legally make such an agreement, and such is the general practice, particularly when the transportation is by trolley, but if the parent refuses, the Board must purchase the transportation.[167]

Such agreements between the board and parents may cover, as was indicated, transportation by trolley or train, or may involve cases where the house of the parent is in a district not served by a school transportation vehicle, in which case there may be an agreement between board and parents that the latter provide means of transportation to trolley line, railroad station, and thence to the school, or even directly to the school, and receive reimbursement from the board on terms upon which there was a previous agreement. This type of situation existed in the cases of Foose v. Holland Township,[168] Loskot v. Bethlehem Township,[169] Becker v. Holland Township,[170] Searles v. Washington Township,[171] and Smith v. Pilesgrove Township.[172] It is important in such cases, however, that the parent make an agreement with the board in the matter, or at least make every effort to come to an agreement, as is shown in the quotations which will be given:

From the decision in Foose v. Holland Township:

> I am of the opinion that had the Appellant furnished this transportation without first having demanded that the respondent perform its duty, he would not be entitled to any compensation, for the reason that a Board

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[167] Polk v. Board of Education of Centre Township, S. L. D., p. 248, decision of Com. of Ed., May 12, 1914.

[168] See footnote 143.

[169] See footnote 157.

[170] Becker v. Board of Education of Township of Holland, S. L. D., p. 245, decision of Com. of Ed., July 1, 1913.

[171] Searles v. Board of Education of Washington Township, Morris Co., S. L. D., p. 250, decision of Com. of Ed., May 20, 1920.

[172] See footnote 141.

of Education cannot be held responsible for any expense incurred without its knowledge or consent.[168]

From the decision in Smith v. Washington Township:

> [When a board of education fails to provide either an elementary or a high school pupil] with suitable school facilities and accommodations including either a schoolhouse convenient of access or transportation in lieu thereof or an allowance for transportation agreed upon by both parties, the [parent of the child is] in the Commissioner's opinion legally justified in contracting elsewhere and on his own responsibility for his son's tuition and transportation and in claiming reimbursement therefrom from the * * * School Board.[173]

The parent in such cases is further protected by the fact that in most cases where the child uses a train as the means of transportation, he cannot be required as a part of such agreement to advance the money for the purchase of tickets although such is frequently the practice:

> To compel a parent to provide the transportation, on the promise that later he will be reimbursed for the amount expended, is not providing suitable facilities and accommodations within the meaning of the law. The only exception to this is where the transportation is by trolley, and the trolley company refuses to sell monthly tickets.[174]

When a parent is allowed by agreement a certain sum by the board of education for transporting his own child, the question naturally arises as to the basis upon which the amount of the allowance should be determined. There has arisen at various times a difference of opinion as to whether the total distance should be used as a basis or the difference between the total distance and the average standard distance within which transportation is not usually required. The following decision bears upon this point, in a case where a pupil lived three miles from a railroad station:

> A child living within two miles of the railroad station ought not and probably is not allowed anything for transportation, hence to place the appellant on the same level with the two-mile children, transportation should not be paid for on any other basis than the one mile of distance outside the limit for which transportation is paid.[175]

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[173] Smith v. Board of Education of Township of Washington, State School Report, 1926, p. 45, decision of Com. of Ed., Mar. 18, 1926.

[174] Lippincott v. Board of Education of Springfield Township (In *MSS.*), decision of Com. of Ed., 1914.

[175] Brands v. Board of Education of Township of Knowlton (In *MSS.*), decision of Com. of Ed., Feb. 18, 1916.

G. Effect of Failure of County Superintendent to Apportion Transportation Funds

If the county superintendent refuses to apportion state funds to reimburse a district for expense met in transporting pupils, this does not relieve the district of further responsibility for furnishing the transportation. It happened in the case of Searles v. Washington Township, previously cited, that the County Superintendent did not apportion to the school district for reimbursement on account of transportation expense, the amount which the board felt was due, and the board thereupon refused to reimburse certain parents for expense they had met in transporting their children to school, upon the basis of agreements made with the board. In the first hearing of this case, the Commissioner said:

> The matter of apportionment by the county superintendent [is] entirely separate and apart from the question of the board's furnishing proper school facilities and * * * such facilities should be furnished by the board regardless of the action taken by the county superintendent in the matter.[176]

In the second hearing, a similar opinion was expressed to the effect that

> * * * the Board is bound to furnish this transportation allowance regardless of any action on the part of the County Superintendent.

The discussion heretofore has concerned cases where transportation was under the law deemed necessary and hence mandatory. It is to be noted, however, that such legal requirement does not limit the authority of a board of education in transporting children to school. While for purposes of apportionment the County Superintendent must approve of the necessity for transportation and of the service offered, this, in the opinion of Assistant Commissioner Strahan, does not prevent a board from providing transportation without the approval of the County Superintendent if the board deems it advisable or necessary.[177] Naturally, however, for such service it is not entitled to apportionment. Many districts, however, feel it desirable to provide such service even at the loss of apportionment.

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[176] Searles v. Board of Education of Washington Township, Morris Co., State School Report, 1921, p. 309, decision of Com. of Ed. This decision was followed by another on the basis of a second hearing, for reference on which see footnote [171] *supra.*

H. Penalty Upon a District for Not Providing Transportation When Required

Under the law, if a district fails or refuses to provide such facilities and accommodations as transportation for pupils, when such is necessary, it may have its apportionment of state funds withheld. This may be done on the one hand by the County Superintendent, who may with the consent of the Commissioner of Education order the custodian of school moneys of the district to withhold from the district any such moneys in his hands.[178] It may likewise be done by the Commissioner of Education in the first instance, since he is authorized by law to direct the county collector to withhold such funds from any district that refuses or neglects to obey the law or the rules or directions of the State Board or of the Commissioner.[179] This power of the Commissioner has been upheld by the courts:

> Order of Commissioner of Education directing county collector to withhold school moneys from township for failure to provide transportation for two children, respectively aged six and seven years, and residing about two miles from school, held authorized by P. L. 1907, pp. 290, 291 * * * amending title of article 10, and § 126 of P. L. 1903 (2nd Sp. Sess.) p. 48, and requiring school district to provide convenience of access to school.[180]

XI. SUMMARY

The pupil in the public schools in New Jersey is the subject of a body of legislation designed to place him in school and to keep him there until he shall have secured such education as the state deems necessary. His interests and welfare are protected at every point. It is required that he be sent to school, and those in control of him as parents or guardians are made responsible for seeing that he attends. He is assigned at the discretion of the school authorities to a school in the district which must be easy of access, or in lieu thereof he must be transported to school, or have his tuition paid in another district, or both. He may not be exploited by his parents or by employers who may desire his services, but must secure at least a reasonable amount of elementary education and reach the age of fourteen, and in some cases fifteen, before he can be employed. The state as an interested party strives to protect his health, both by inspection for physical defects, by control of communicable disease and sanitation, and by encouraging districts to provide special facilities for promoting health and for educating those who are physically handicapped. It protects him from unreasonable punishment in school at the hands of his teachers.

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[177] Letter, Asst. Commissioner C. J. Strahan, Dec. 29, 1931.

[178] Code, Sec. 196.

[179] Code, Sec. 9 (XIV).

[180] Board of Education of West Amwell Township v. State Board of Education et al. 135 A. 664 (1927).

The state demands of the pupil, on the other hand, that he pursue the school studies, conduct himself in a respectful manner, and refrain from anti-social activities.

In this manner, the state both protects the pupil, and ensures its own welfare by requiring that children avail themselves of the educational facilities provided.

CHAPTER XIII

CONCLUSIONS

I. In New Jersey, the state is interested in public education, not only as a means of ensuring the future efficiency of its citizens, but also as a means of promoting the common good and for the protection of the welfare of the state.

II. The people of New Jersey through the State Constitution have made it the obligation of the legislature to provide a thorough and efficient system of free public schools.

III. In the exercise of this duty, the legislature has reserved part of the responsibility to itself directly, and has delegated part of it to subordinate units, created by the legislature for that purpose.

IV. The state endeavors in its relations with local units to stimulate local initiative and development, to divide the burden of cost, and to equalize educational opportunities for all children in the state.

V. Inherently, the final power to control, administer, and support the public schools is in the hands of the state, and all funds raised for that purpose, either by the state or by local units, are in fact state moneys.

VI. The state is interested in private education only to the extent that it may protect the rights of the child and the rights of the public at such points as affect their respective interests.

VII. Adequate school facilities for children in local school units have been interpreted to include both elementary and high school education as a minimum program.

VIII. The legislature has delegated to the State Board of Education and to the Commissioner of Education the major responsibility in having charge of the interests of the state in educational matters. Under this plan, generally speaking, the State Board has been given extensive legislative powers, and the executive and administrative functions have largely been lodged with the Commissioner of Education and the Department of Public Instruction.

IX. The policy of giving to the State Board and the Commissioner of Education the interpretation of the school law, and the settlement of disputes arising under that law, has produced a body of decisions and rulings which cover the most important questions arising under the school law.

X. The state is constitutionally within its rights in providing for a program of higher education through the utilization of private institutions of higher learning in the state, so long as it retains supervision over its investment, or it may set up its own institutions under its own immediate control.

XI. The school district is essentially an independent municipal corporation, or quasi-corporation, but is subject to being altered or abolished by the legislature at the latter's will, or to having its powers abridged or repealed by that body.

XII. Boards of education in local school units, although possessing wide powers, must exercise them in a strictly legal manner and within the limits of their authority as prescribed by the law or as defined by the courts. Failure to do so, renders the boards and their members liable to appropriate legal action.

XIII. School authorities in the making of contracts are subject generally to the same laws and provisions concerning contractual relations as is a private individual, and these laws and provisions are designed for the protection on the one hand of public funds and interests, and on the other hand of those persons dealing with such authorities.

XIV. The state has recognized its obligation to ensure the support of public education by devoting the income of the State School Fund, the State School Tax, the Main-stem Railroad Tax, and the income of the Surplus Revenue Funds, to this purpose. It furthermore appropriates funds directly out of general state revenues for certain educational purposes, and requires each school district to levy taxes for school support. Likewise, it permits each unit, under certain conditions, to secure funds through bond issue for appropriate school purposes.

XV. The legislature has set up a machinery for the protection of the interests of taxpayers in local school finance which includes the following:

A. In Article VI districts, annual school budgets are subject to the approval of a municipally controlled Board of School Estimate, and in Article VII districts they are subject to the approval of the voters themselves.

B. In Article VI districts, bonds may be issued only on approval of their purposes by the Board of School Estimate, and beyond certain limits by the governing body of the city government, and beyond further limits by the approval of the voters. The bonds in such districts are issued by the municipal government, and not by the school district. In Article VII districts school bonds may be issued only on approval of the voters, but without legal limitation in amount.

XVI. The law and the decisions of the courts have declared the school boards in Article VI districts to be independent of municipal control in the expenditure of school moneys, when once appropriated to them. School boards generally, in this matter, are controlled only by the provisions of the law and by the courts.

XVII. The program of studies of both elementary and high schools in the state is in its minimum requirements partly prescribed by law, and partly determined by the Commissioner of Education, subject to the approval of the State Board of Education. Beyond such minimum requirements, the program of studies is subject to determination in Article VI districts by the local boards of education, and in Article VII districts by the county superintendent and the local boards.

XVIII. The state is able to control the program of studies and the standards of work in high schools and in vocational schools through its system of approval of such schools, and through its apportionment of state funds.

XIX. The laws of New Jersey, and the decisions of the courts and of the school tribunals, have provided for teachers, supervisors, and principals a very considerable degree of protection and security in the matter of employment, tenure, salary, and retirement from service. These are to be interpreted, however, as intended primarily for the improvement of the school system, rather than for the special benefit of such employees.

XX. The state and county agencies in education are limited as to personnel both by the provisions of the law, and by the amount of appropriations granted by the legislature; local school boards are restricted by the law in this matter only in respect to the higher or administrative officers, but otherwise are free to employ such personnel as may seem to them to be needed.

XXI. Certain employees of the public school system are given a favored status in the matter of tenure, and in some cases of retirement allowances or security from dismissal. Such employees are those under the protection of the civil service act, who are in the classified service of the state or of any district adopting the provisions of the act; the district clerk or secretary; school janitors; attendance officers; and, in respect to retirement allowances only, medical inspectors. Other employees are given no guarantee of position or term of employment, unless coming under the Veterans' Tenure Act. The city superintendent is much less secure in his position than any teacher under tenure.

XXII. In most cases, the duties of the various persons employed by the state or by the local school units are described at least in general terms by the school law, and may be specified more particularly by the agencies which employ them. An exception to this principle is the district clerk or secretary, whose duties have been ruled to be purely statutory.

XXIII. The provision that children between the ages of 5 and 20 years who reside in the state are entitled to enjoy suitable school facilities and accommodations in free public schools, is supplemented by a requirement that within certain ages they must avail themselves of such privileges, and must submit to the control of the school teachers and other school authorities while in attendance at school.

XXIV. Since the constitution requires the legislature to make provision for the education of all the children in the state, New Jersey has through its laws set up a program for the training and care of atypical groups of children, which include the mentally subnormal, the physically handicapped, and the delinquent.

XXV. The provision of suitable school facilities for children of the state includes either a school of the proper grade convenient of access in their own districts, or assignment to a school in another district which is convenient of access, or transportation to a school at the expense of the district. When assigned to a school in another district, the tuition charge must be met by the school district of residence. The obligation of the district of residence to provide transportation depends upon the remoteness of the pupil from the school to which he is assigned, a term which has been ruled to vary with attendant conditions, and with the physical characteristics of the pupil.

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